Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 240.

JAMES L. DENVER AND CHARLES F. PECK,
APPELLANTS,

Vs.

ARCHIBALD ROANE,
Executor of the Testament of James Hughes, dec'd.

ON APPEAL

FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF AND ARGUMENT FOR APPELLANTS.

PIKE & JOHNSON,
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WASHINGTON, D. C.:
JUDD & DETWEILER, PRINTERS.
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DENVER AND PECK v. ROANE, Executor.

FOR THE APPELLANTS.

BRIEF.

§ 1.

POINTS OF FACT AND PLEADING.

1. In 1865 a partnership was formed in the city of Washington for the prosecution of claims against the Government chiefly, which was reorganized in 1866. It was composed of James Hughes, James W. Denver, and Charles F. Peck; and was in all respects an equal partnership. There were no articles of partnership.

Testimony of Denver: Record, p. 118.
of Peck: Record, p. 187.

2. Mr. Hughes had been a member of the lower House of Congress from Indiana, a lawyer in that State, and for a short time a Judge of the Court of Claims of the United States. The bill indulges in certain statements as to his "large political and legal reputation," and his superiority to the other members of the firm, which are denied by both answers, and not sustained by the evidence, nor confirmed by the printed reports of the Court of Claims of the period during which he at times sat on the bench.

3. The further history of the country informs the Court that Mr. Denver had been a member of the lower House of Congress from California, Governor of the Territory of

Kansas, Commissioner of Indian Affairs, and Major General of the army of the United States during part of the Civil War.

4. The firm received a great number of claims, many for large amounts, for collection, and prospered abundantly.

5. On the 18th of March, 1869, a paper was signed in triplicate by the three partners, by which it was agreed:

a. That thereafter no new business should be received in partnership, but each should be at liberty to receive and transact new business for himself.

b. That all new business coming to the firm should be equally divided.

c. That the business of the firm, theretofore received and then in hand, should "be closed up as rapidly as possible by the members of the firm as partners under their original terms of association and in the firm name."

d. That nothing as to new business should be thereafter entered on the books of the firm, but only such entries should be made therein as should be necessary and proper "to the closing up of the business and cases already in charge of the firm."

Record, page 5.

6. On the 13th of August, 1869, Mr. Hughes addressed a letter to Mr. Denver, from Washington, to Wilmington, Ohio, saying: "Mr. Peck and I agree that in case of the death of any one of us, his heirs or personal representatives, or their duly authorized agent, shall receive one third of the fees in cases nearly finished, and twenty-five per cent. in other partnership cases. Do you agree to this? Answer here. If you approve this, sign it on the other side and return it."

Record, p. 6.

7. Mr. Peck endorsed on this letter, "This proposition has been submitted to me, and I agree to it."—*Ib.*

8. Mr. Denver, at Wilmington, on the 18th of October, endorsed on it, "I agree to this, but with the express understanding that all the partnership obligations shall be first satisfied, before any such division can be made at any time." —*Ib.*

9. No reply to this was made by Mr. Hughes. He put the letter away, when it was returned to him, and neither Peck or Denver ever saw it again, until it was produced in this suit.

Testimony of Denver: Record, 119.
of Peck: Record, 116.
of Roane: Record, 55, 56, 152.

10. At the date of this letter Mr. Hughes had overdrawn, or received more money from the firm than his proper share, to the amount of several thousand dollars, (nearly $12,000;) and Mr. Denver held a note that had been made by the firm for $7,000, which he had paid and taken up.

Testimony of Roane: Record, 54, 55.
of Denver: Record, 119, 129.
of Peck: Record, 116.

11. The stipulation made by Mr. Denver was not assented to in practice by Mr. Hughes. While he continued largely in debt to the firm, he still insisted, on all occasions, on receiving his third of every fee. He forced the clients of the firm, in one case, to pay over to him $11,637.75 against the written protest of both Denver and Peck. They constantly endeavored to get money to square up the accounts; he endeavored to get hold of all he could, claiming that he had a right to contribute or not contribute to the payment of the debts, as he pleased.

Testimony of J. W. Denver: Record, 141, 142.

12. On the 1st day of January, 1874, each had received, net, after all deductions:

Mr. Hughes	$99,419.60
Mr. Denver	93,294.98
Mr. Peck	93,505.98

Answer of Denver: Record, 14, 19, 129.
Answer of Peck: Record, 33, 38.
Exhibits J. W. D., 2, 3, and 4: Record, 23, 24, 25.
Testimony of Denver: Record, 141, 142, 143.

13. The note for $7,000, which Mr. Denver held, taken up at the request of Mr. Hughes on the 3d of June, 1869, (after the dissolution,) was not paid off until three years or more afterwards; although, in the meantime, in December, 1871, the fee in the Burns case was realized, and in February, 1872, the fee in the La Plante case; $21,206.31 and $14,696.11, of each of which Mr. Hughes insisted on receiving, and received, a full third.

Testimony of Roane: Record, 54, 55, 143.
of Denver: Record, 119, 129.
of Peck: Record, 83.

14. In July, 1869, the office of the firm was removed from G street to Pennsylvania avenue, and Mr. Hughes removed to and had his office in Alexander's Building. In May, 1870, he moved to rooms over the office of the firm.

Testimony of Roane: Record, 13, 60, 61, 150.

15. When the firm took the rooms on Pennsylvania avenue, in July, 1869, about four months after the dissolution of the partnership, each took a separate room; Mr. Hughes the middle one. He put some furniture into it, and practically abandoned it. Mr. Peck believes that he never saw him in it five times, and does not know that he ever saw him sit down in it. He scarcely ever went to it, except to pass through, or look in. Arthur Denver, who was in the office of the firm from March, 1869, does not think that, in

all the time, he passed half a day in that room. He wrote hardly half a dozen letters. He went occasionally to the office, from March, 1869, to March, 1872; but did not stay there at all. Did not work in the room appropriated to him, and consulted with his partners very little about the business. The testimony of Delaney is to the same effect. Mr. Peck rarely saw him.

Testimony of Peck: Record, 86, 87.
of J. W. Denver: Record, 122.
of Arthur Denver: Record, 133, 134.
of Delaney: Record, 137.

16. Mr. Hughes had a very good library. He brought it to Washington in 1865 or 1866 and placed it in the office of the firm, and in the fall of 1869 he sent it to Indiana.

Testimony of Denver, Record, 141.

17. Mr. Archibald Roane came from Richmond, Virginia, in the fall of 1865, having been chief there of the produce loan office of the Confederate Government, which had charge of the cotton operations of that Government. The firm of Hughes, Denver & Peck was at that time employed by the Treasury Department under a contract for the discovery and collection of Confederate property. In regard to one case referred to them, Mr. Roane had information—*especial* information—and his "services were called into requisition," and, as he says in another place, he went to the office to give them some information in regard to it. And this led to his being employed by Mr. Hughes alone in April, 1866, and by the firm in the fall of that year.

Testimony of Roane, Record, 52, 150.

18. In June or July, 1869, Mr. Roane formed a partnership with Mr. Hughes, but continued, at the same time, to act as clerk of the firm. In May, 1870, Messrs. Hughes,

Roane and Middleton formed a partnership, which continued until the death of Hughes.

Testimony of Roane; Record, 150, 53.

19. Mr. Roane received a salary of $1,800 per annum, part of the time, and $2,000 per annum part of the time; and, *in the summer of* 1870, when he gave up everything except the books of the firm, it was reduced to $1,000 per annum. Up to that time he had not informed Mr. Denver, nor can say that he had informed Mr. Peck that he had formed a partnership with Mr. Hughes.

Testimony of Roane; Record, 194.

20. In October or November, 1872, Mr. Roane's connection with the firm ceased.

Testimony of Roane; Record, 53.

21. In the winter of 1867–68 Mr. ~~Peck~~ Hughes had gone into the Legislature of ~~Indiana~~ Indiana, and was absent a great deal from Washington. He was also in that Legislature in the winter of 1868–69.

Testimony of Denver; Record, 118.
of Pike, Record, 207.

22. At the beginning there was no special apportionment or division of the business between the partners; but by degrees all the business in the Court of Claims came to be in charge of Mr. Peck, the department business in that of Mr. Denver, and Mr. Hughes took for his share that in this court, in which for a long time the firm had no cases, and in all, during the whole time, about a dozen.

Testimony of Denver; Record, 118.
of Peck; Record, 87, 116, 182.
of Arthur Denver; Record, 134.
of Roane; Record, 58.

23. During the earlier period of the existence of the firm,

Mr. Hughes attended to some of the cases in the Court of Claims and to business before the departments, and performed considerable labor with great advantage to the firm.

Testimony of Peck; Record, 112, 110, 95.

24. After the dissolution, in March, 1869, he paid no attention at all to the business in the Court of Claims, except in perhaps one case; he neglected the few cases in the Supreme Court, did not prepare them properly, procured other counsel to assist in arguing them, and left one very important and difficult case to be heard in this court, without providing for its argument at all. During the last years of his life he had an unconquerable aversion to reading or writing, and it was almost impossible to get him to look at a case or do any writing about a case. The cases in the Supreme Court are mentioned in detail in the testimony, and it appears that he argued only perhaps half a dozen of them. In two or three he did not prepare his briefs or inform himself about the cases until the last moment, and then imperfectly. The business in this court was inconsiderable, and even that he did not properly or diligently attend to.

Testimony of Peck: Record, 109, 110, 64, 65, 69, 70, 71, 72, 73, 75, 76, 77, 78, 79, 80, 95, 96.
of Roane: Record, 57, 58, 61, 146.
of Denver: Record, 117 to 121, 122 ff.
of Arthur Denver: 134.

—as to the business in the Court of Claims, and as to the cases in the Supreme Court:

Testimony of Peck: Record, 65, 80, 87, 88, 106 ff.
of James W. Denver: Record, 137 to 140.
Exhibit C. J. W. D.: Record, 51.

25. The firm had also a number of suits for large amounts before the British and American Commission, (13, the

aggregate amount claimed being nearly $10,000,000,) of which *one* only was allowed for $98,420. Mr. Hughes paid no attention whatever to these cases, and they were managed exclusively by General Denver, except that of Haskins, which was gained, and which, as Mr. Hughes would not attend to it, was entrusted to and managed by Mr. Arthur Denver.

Testimony of Peck: Record, 183.
of Denver: Record, 120.

26. In February, 1872, in consequence of the enormous labor imposed on him, Mr. Peck was prostrated by so dangerous a sickness that his physicians even forbade the mention of business to him. The term of the Court of Claims was at hand and a great number of cases of the firm stood for trial, it being the first term at which much was to be done. Mr. Denver urged Mr. Hughes to assist him with the cases, in part only of which briefs were ready; and he finally agreed to take *two* of them, but took only *one*, a small case; carried away the papers, kept them two weeks, and returned them "without a scratch of a pen." Repeatedly urged by Mr. Denver to assist him, he never refused, *but he never did it*, and *all* the labor and responsibility fell on Mr. Denver alone.

Testimony of Denver: Record, 119, 120, 121.
of Peck: Record, 187.
of Arthur Denver: Record, 133.

27. From the time when Mr. Peck was prostrated, nearly 100 cases have been disposed of. An incomplete list gives 86 of them. Of these three-fourths were disposed of during the two terms immediately following his sickness. In a few cases Mr. Denver had assistance in the oral argument of the cases; but none at all, of any kind, from Mr. Hughes. Besides he had thrown upon him all the immense correspondence and the preparation of the claims before the

British and American Commission; while, during that year, (1872,) Mr. Hughes paid no attention to the business of the firm, except to a few cases in the Supreme Court.

Testimony of Denver: Record, 119 to 123, 206.
of Peck: Record, 64, 76.
of Arthur Denver: Record, 133, 134.

28. The force of this testimony is not broken by that of Mr. Roane, who admits that Mr. Hughes gave no attention to these cases, and with all his opportunities does not *know* that Mr. Denver prepared even *one* brief.

Testimony of Roane: Record, 57, 58, 60, 61, 146, 147.

29. The great broad fact proven in the case is that from the day of the dissolution of the partnership Mr. Hughes almost wholly ceased to perform any of the duties of a partner. He attended to *nothing* in the Court of Claims; to *nothing* in the Departments; to nothing before the British and American Commission; to *nothing* before the Southern Claims Commission; to nothing in the office; to none of the correspondence. He removed from the office of the firm to another, and formed another partnership, *not made known to his former partners*, although his new partner was retained in the employ of the original firm *on his full salary* for almost a year. He attended to nothing, except a part of the few cases which the firm had in this Court, of which it does not appear that he argued more than four or five in all. The utmost that can be said for him is that he did not *quite* utterly abandon the business; but with little labor and little efficiency continued in charge of a little part of it, casting all the *burdens* of the partnership upon his associates, and with remarkable punctuality taking his third part of all that their labor earned. This is, without exaggeration of a hair's breadth, what the testimony *proves*, and what the complainant-lawyer-witness himself admits when the list of all the cases in this court is taken as a part of his testimony.

30. The dissolution of the partnership in March, 1869, was at the instance and on the demand of Mr. Peck, who was dissatisfied at the neglect of the business by Mr. Hughes. The demand offended Mr. Hughes. Afterwards, in the spring and summer of 1869, Mr. Denver endeavored to sell his interest in the business, making propositions to that effect to Mr. Peck and Mr. Hughes, but nothing came of that.

Testimony of Denver: Record, 118.
of Peck: Record, 185, 188.
of Roane: Record, 189, 190.

31. On the 2d of May, 1872, in consequence of neglect of a case on the part of Mr. Hughes, (accepting a notice to take depositions, and neither attending to it himself nor informing either of his partners,) a quarrel occurred between Messrs. Denver and Hughes, to which Mr. Roane, in whose handwriting the notice was, was also a party.

Testimony of Denver: Record, 121.

32. The next day Mr. Hughes sent a letter to Mr. Denver, demanding that he should cause his brother, Mr. Arthur Denver, to leave the office. On the 7th of May he wrote one to Mr. Arthur Denver. On the 14th Mr. James W. Denver wrote to him in reply, copy of which letter is Exhibit J. W. D., No. 9. In it he refused to send his brother away from the office, and then said: "The real cause of difference between us was the almost total neglect by you of the old business of Hughes, Denver & Peck, when, by the terms of the dissolution of March 16, 1869, you, as well as myself, were bound to give it proper attention. To avoid that issue you invent a complaint against my brother."

And he concluded thus: "After what has occurred, it is time for us to separate. We can, as soon as Mr. Peck gets back, divide our business fairly, or get others to do it for us; but, however it may be done, I demand that the

business relations between you and myself shall be definitely and finally closed at the earliest moment practicable."

Record, 121, 122, 28.

33. Mr. Hughes replied on the 10th of June, 1872. Quoting the demand, he said: "I presume that you carefully considered the full scope and effect of your demand before you made it. There is but one course open to me consistent with the principles which I observe as a rule of action, and that is at once to accede to your demand, which I now do."

He was satisfied that no "amicable negotiations" would suffice to close the business relations between them, and said: "I do not intend to conduct in person any business of a nature that may lead to controversy with you, and will therefore put this business in the hands of counsel, who, when selected, will give you notice of the fact."

In the meantime, he said, Mr. Denver could institute legal proceedings to close the business relations, which he would facilitate, and notified him that, as the firm was already formally dissolved, no single member could act for the firm except by courtesy, consent, or express authority.

Exhibit J. W. D., No. 10: Record, 29.

34. Mr. Hughes then prepared (or partly prepared) a bill against Mr. Denver for suit in chancery, and the latter had frequent messages about it. After the 2d of May there was never any personal communication between them. He came into the office but two or three times, and then not to speak to Mr. Denver, but to be as offensive as possible, one day standing by the door and making faces at him until ordered out of the office.

Testimony of Denver: Record, 122.

35. The attempt to show that Mr. Hughes was not able, on account of ill health, to attend to the business of the firm in 1872, is a failure. "In 1872," Mr. Roane says, "he

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Testimony of Denver: Record, 122.

35. The attempt to show that Mr. Hughes was not able, on account of ill health, to attend to the business of the firm in 1872, is a failure. "In 1872," Mr. Roane says, "he

was *threatened* with paralysis. There was permanent drooping of the upper lid of the *left* eye," and during much of the summer he was incapacitated from reading or writing * * * utterly incapable of performing *any* services, either for himself or any body else." With return of cool weather he became able to attend to business at intervals: but had frequent attacks; and early in 1873 was taken with symptoms of heart disease.

His physician, Dr. Wells, says that in 1872 he had a little trouble with his kidneys, complained generally, had a little paralysis of his *right* eyelid; and seemed to be unable to attend to business. The physician advised him to go away. *But this was late in* 1872; and he did not attend him before July.

So that there is *no* evidence that at the time when his attention was especially wanted, upon the going to Europe of Mr. Peck, he was at all unable to give it.

Testimony of Roane: Record, 57.
of Wells: Record, 198.

36. And he neglected the business quite as much, from March, 1869, to March, 1872, as he did from that time up to his death.

Testimony of Roane: Record, 62.
of Peck: Record, 86, 87, 99.
of Denver: Record, 121, 122.

37. Without an allusion on the part of Mr. Denver or Mr. Peck, or their counsel, to the "*habits*" of Mr. Hughes, Mr. Roane has made them figure in the case. Testifying, on the 28th of November, 1874, in regard to Mr Peck's demand of dissolution in March, 1869, he said, "He made objections to Judge Hughes' habits, not only with regard to drinking, but other matters, which he said brought discredit on the firm." And he inquired of the physician, whether he thought "his habit of drinking" had anything to do,

particularly, with causing his sickness? and whether he was in the habit of drinking more than usual? to which the answer was "Yes: more than most men." One who drank freely, and had other bad habits that brought discredit on the office could hardly fail to *neglect* the business, and to be often *incompetent* to attend to it.

Record, 189, 199.

38. Shortly before the death of Mr. Hughes, which occurred on the 21st of October, 1873, he preferred charges of professional misconduct against Mr. Denver, and sought therefor to disbar him, in the Supreme Court of the District of Columbia. He presented them in person, on the 19th of October.

Answer of Denver: Record, 18, 21.
Testimony of Peck: Record, 101.
Admission of Roane: Record, 101.

39. After the death of Mr. Hughes, and a correspondence between his executor and Messrs. Denver and Peck, Mr. Arthur Denver and Mr. Roane went over and adjusted the accounts on the firm-books, up to January 1, 1874. It was found that Messrs. Denver and Peck had in hand, of net receipts for fees in firm cases, about $9,000. On the 14th of January, 1874, they paid Mr. Roane $1,000; and on the 19th, $2,000, for each of which sums he receipted "on account of fees received by said Denver and Peck in cases of the late firm."

Bill: Record, 3.
Exhibits A and B: C. F. P.: Record, 45.

40. It is strenuously contended by Mr. Roane, who testifying argues, and arguing testifies, that this was a *settlement, pro tanto*, and a recognition of his right, by payment of one-third, to one-third of fees received. But this pretence is

exploded by the testimony of Messrs. Peck, Denver and Arthur Denver, and by his receipts.

Record, 81, 103 to 106, 130, 135, 136.

41. A Mr. Hunton claimed part of the fee received in the case of La Plante's claim. He had sued Messrs. Hughes, Denver & Peck for it, and Mr. Hughes had made damaging admissions. After his death, Mr. Peck proposed to compromise the matter, and Mr. Roane gave his consent, "with the understanding that the balance of Judge Hughes' share of recent collections and his share of all future collections should be promptly paid over to him." *This*, Mr. Roane conceives, "constitutes a supplementary contract," because no reply being made to it, the compromise was made. On the other hand, Mr. Peck states that he simply disregarded it.

Testimony of Roane: Record, 57, 58, 192.
of Peck: Record, 84, 85.

42. After the adjustment of the books up to 1st January, 1874, other moneys were received, among them the fee in a suit upon a claim of Gazaway B. Lamar, which Mr. Hughes had denounced and abandoned; but his executor nevertheless had set up claim to a third of the fee. Messrs. Denver and Peck declined to submit to his demands, and he filed the bill in this case, showing what they had collected, and what other business they had in their hands, with prayer that they might be compelled to bring into court "the whole amount of the fees derived from each of the aforesaid causes, and all other fees that they might from time to time derive from *any* of the firm business in their hands, and that an account of the unfinished business might be taken, and for general relief."

43. The court below acceded to the theory of the complainant, that the letter of August 13, 1869, and the endorsements upon it made a valid contract, and that Messrs. Den-

ver and Peck must settle with the executor accordingly; that is, must pay him one-third of all fees collected by them in cases that were "nearly finished" at his testator's death, and one-fourth of those collected in all other cases, and must continue to work on those terms, paying over a third or a fourth of each fee, from time to time, and at any future time collected—working for his benefit as much as their own, and "finding" themselves, he doing nothing and expending nothing, but watching for the fees to come in that he might promptly demand his share; cases lost not concerning him.

Decree: Record, 208.

44. Among the claims in the hands of the firm was a very large one in favor of Gazaway B. Lamar, including in itself one in favor of Martin for cotton in which Lamar was in part interested. It came into the charge of the firm in the spring of 1868, and the suit on it in the Court of Claims was brought soon after. The claim was just, but payment of it was considered extremely doubtful, for reasons stated by Mr. Peck in his testimony.

Testimony of Peck: Record, 167, 168, 169, 170.

45. The suit was kept on the docket by Mr. Peck, by dilatory courses detailed by him, until the decision of this court in Klein's case. The testimony was all taken—chiefly in 1869—prior to the 9th of January, 1873. It was very voluminous, covering some 500 pages of printed matter, with a large amount of evidence procured from the Treasury Department. Early in January, 1873, Mr. Hughes and Mr. Lamar quarreled, and the former announced to the latter that he should withdraw from his case, went up to Mr. Peck's office, and requested him to draw up a motion to that effect for him, saying that he intended to require Mr. Lamar to settle with him personally for the services he had rendered in the case. Mr. Peck drew up the motion for him, and handed it to him the same day. On the same day also, taking Mr. Peck as a witness, Mr. Hughes stated to

Mr. Lamar that he had determined to withdraw from his case, and the latter replied that he was very glad of it.

Testimony of Peck: Record, 169, 170, 171, 166, 169, 174.
of Roane: Record, 153.

46. When Mr. Peck handed Mr. Hughes the motion for leave to withdraw from the case, he took it, not looking at it, or if he did, making no comment on it; but he afterwards struck out two portions of it, and made an addition at the end. Of these alterations Mr. Peck knew and heard nothing, until after his death. After the alterations had been made, the paper read thus: "Now comes James Hughes, heretofore one of the attorneys of record in this cause, and moves that he have leave to withdraw his appearance, *reserving to the firm of Hughes, Denver & Peck, and every member thereof, all rights as to full compensation for services rendered up to the present time.*"

Exhibit A. R., No. 7, of the bill: Record, 8.
Testimony of Roane: Record, 153, 154.
of Peck: Record, 167.
of Denver: Record, 174, 175.

47. This *arrière pensée* (the last clause, printed by us in *italics*), was not in the paper as prepared by Mr. Peck. It was added by Mr. Hughes himself. It was a mental reservation, communicated in confidence to the faithful bosom of Mr. Roane only, and never made known to any one having an interest to know it; neither to Mr. Lamar, nor to Mr. Denver, nor to Mr. Peck. Mr. Hughes, in his lifetime, never hinted to either of them, that he intended to claim any interest in any fee that might be paid in case of success.

Testimony of Roane: Record, 154, 155, 156.
of Peck: Record, 167.
of Denver: Record, 175.

48. Nor did Mr. Hughes use this paper for any public purpose, nor as a motion. On the contrary, he prepared another, or had Mr. Roane to write one, which only he filed, in these words: "Now comes James Hughes, one of the attorneys of record in this case, and asks leave to withdraw his appearance herein."

Authenticated copy: Record, 165.
Testimony of Roane; Record, 154, 155.
Exhibit A. R. 7, of the bill: Record, 8.

49. The motion was filed on the 9th of January, 1873, and allowed by Hon. Ebenezer Peck, a Judge of the Court of Claims. Mr. Hughes, at the time, denounced Lamar to that Judge, as a great rascal, and the case as altogether without merit, and a fraudulent one, and said that he had decided not to be involved in a case of so scandalous a character, and for so worthless or unworthy a client. He said that he declined to have any interest in the case, *or to take fees in it*, (in reply to a question or remark of Judge Peck, in regard to the fee,) because he believed that the case was a corrupt one, and not likely to succeed, and that he would not lose much by his withdrawal from the case. The burthen of what he said was, "that he would not be *tainted* by having anything to do with, or by receiving fees in, such a case."

Testimony of Judge Peck: Record, 179.

50. But he entrusted the paper drawn up by Mr. Peck, as altered and added to by himself, to the faithful custody of Mr. Roane, to be kept by him "as a record of what had taken place in the case;" "as a history of the transaction."

Testimony of Roane: Record, 155, 156.

51. And when judgment had been given, on the 2d of June, 1873, in the Court of Claims, for Lamar, in the sum of $579,343.51, he had Mr. Roane to make an entry of it in the diary of the firm of James Hughes & Co., and to add

this note: "In this case, Denver and Peck are counsel of record, Judge Hughes having withdrawn his appearance, but without relinquishing his right to his portion of the fee to be paid by Lamar." He did not, however, during his lifetime, make this pretence known, either to Mr. Denver or to Mr. Peck.

Testimony of Roane: Record, 157, 158.
of Peck: Record, 167.

52. The complainant endeavors to give an air of respectability to his claim for a third of this fee by proof that most of the labor in the case had been done before Mr. Hughes withdrew from it. Mr. Peck had done all the work in the case, except that done by Mr. Denver. They attended to the taking of all the testimony; Mr. Hughes to none of it. All that he ever did in the case was in April, 1872, during the temporary absence of Mr. Peck, to file a motion in the case to obtain leave to make amendments to the petition; and not to file them after he had obtained the leave. He did once, while Mr. Peck was sick, have notices given to take depositions at Washington, and when the witnesses came from New York and Savannah Mr. Hughes was not to be found, having gone on a fishing excursion, and Mr. Denver was compelled to attend, that day and the next, to taking the depositions.

Testimony of Roane: Record, 153.
of Peck: Record, 171, 172, 173.
of Denver: Record, 174, 175.

53. The facts were complicated, and the preparation of the case, owing to the great mass of proof, required much labor. This had to be done after the withdrawal of Mr. Hughes. And also the executor of a former partner of Mr. Lamar intervened in the case, claiming one-third of what might be recovered; and out of this grew a trouble-

some and annoying controversy before the Court for several days, but in which Mr. Peck succeeded.

Testimony of Peck: Record, 171, 229, 230, 172.

54. On the 30th of August, 1873, the United States appealed to this Court from the judgment in favor of Lamar. A distinguished gentleman was employed by Mr. Lamar, and after a motion by him to dismiss the appeal on legal grounds had been overruled here, it was dismissed on his motion *by consent*, for which service his fee, from Mr. Lamar, was some $20,000.

Testimony of Roane: Record, 158, 163.
of Denver: Record, 228.
of Peck: Record, 173, 232.

55. The firm had always insisted on a fee of 20, or at least 15, per cent. in the Lamar case, (except as to the Martin case, included in it;) but no agreement with Mr. Lamar had been effected by them up to the time of the withdrawal of Mr. Hughes, Mr. Lamar never proposing to pay more than 10 per cent. And, after the withdrawal of Mr. Hughes, Mr. Peck concluded a contract for himself and Mr. Denver for 10 per cent. In the Martin case the fee was at first a small one, then increased to 50 per cent., and finally reduced by Mr. Peck, after Mr. Hughes' death, to 30 per cent.

Testimony of Peck: Record, 167.

56. The court below decreed that the executor of the testament of Hughes was entitled to recover from the defendants "the full one-third of all moneys which have come, or may hereafter come," to their hands, in all cases that were nearly finished when Mr. Hughes died, and "one-fourth part of moneys received, or to be recived, by them in all other cases;" in pursuance of the contract, decreed to have been created by the letter of August 13, 1869, and the endorsements on it, and to be valid and binding; and

it was also decreed that the Lamar case, including the Martin case, fell within the terms of that contract.

Record, 208.

57. Upon reference to the Auditor, he decided that such cases as had gone to judgment in the Court of Claims at the time of the death of Mr. Hughes, and in which, if appealed to this Court, the appeals were withdrawn and dismissed after his death, without trial here, were cases *nearly finished* at Mr. Hughes' death.

Record, 240.

58. The Auditor thereupon found that 17 cases were nearly finished at his death, all of which had been finally disposed of, and settlement made between the parties of the fees collected in the first ten.

He found that at the death of Mr. Hughes the firm had 46 other cases, 7 of which had been finally disposed of.

And that, in the cases nearly finished, that had been disposed of, fees had been collected to the amount of $131,637.69, and in other cases to the amount of $3,135.29.

Record, 241, 242, 243.

59. The fee in the Lamar case (Martin case deducted) is stated at $53,445.90, being 10 per cent. That in the Martin case $13,465.34, being 30 per cent.

Record, 243.

60. The defendants below excepted to the Auditor's ruling as to the meaning of the term *nearly finished*, and to his decision upon each case decided by him to have been nearly finished. The Court overruled the exceptions, and adopted the rule established by the Auditor.

Record, 245, 246.

61. The defendants specially excepted to the decision that the cases of John L. Hardee and John Haskins were *nearly finished* at the death of Mr. Hughes.

Record, 245.

The appellants considered as cases nearly finished such as had gone into judgment and were not appealed, nor new trials asked for, so that no further labor was required to be done but to collect the money.

Exhibit X. 1. Statement: Record, 235.

Test. of Denver before Auditor; Record, 223.

62. In the case of Hardee judgment was obtained on the 31st of March, 1373. The Attorney General moved for a new trial, on the ground of fraud, wrong, and injustice. Many affidavits were taken (some 30 of different persons,) by the appellants, and the Attorney General took depositions, and the labor was greater, Mr. Peck positively states, than on the original trial. The motion for a new trial was overruled on the 22d of April, 1874.

Testimony of Peck: Record, 65, 66.

of Denver before Auditor: Record, 223.

of Peck before Auditor: Record, 229.

Report of Auditor, 240, 241.

63. The cases of Samuel G. Cabell, the Home Insurance Company of Savannah, the Southern Insurance Company of Savannah, were decided by the Auditor and Court to have been nearly finished at the death of Mr, Hughes.

The first of these was *not* nearly finished. In was on appeal in this Court *when the matter was before the Auditor*, with a defective record, that would compel its being remanded to the Court of Claims, where a statement of facts would have to be made up, and after that it would come here again to be tried, the trial here involving more labor and care and responsibility than the trial in the Court of Claims.

Testimony of Peck before Auditor: Record, 228.

64. Nor were the Insurance Company cases. They were appealed to this Court long after the death of Mr. Hughes, were argued here in a manner that involved a great deal of

labor, care, and responsibility, quite as much, if not more, than the preparation below: and they were affirmed.

Testimony of Peck before the Auditor: Record, 228.

65. Arguing that the fee of 10 per cent. contracted for with Mr. Lamar, by Messrs. Denver and Peck, contained nothing by way of compensation for services of Mr. Hughes, and was therefore less than the fee of the firm would have been by five per cent., it always having claimed 15; and as it was adjudged that the 10 per cent. contracted for belonged to the firm and one third of it to Mr. Hughes' estate, the firm had received so much less, in consequence of the withdrawal of Mr. Hughes, than it would have received if he had not withdrawn, the defendants claimed that his estate should be charged with that loss. The Auditor overruled the motion, and exception to his ruling was overruled by the Court, and the ruling sustained; and this is assigned here for error.

Record, 237, 245.

66. The defendants also claimed that the sum of $4,500 should be charged to the estate of Mr. Hughes, as a loss of the firm, caused by his wrongful admissions made to Thomas Hunton and one Chadwick, claiming one half the fee in the La Plante case; his admissions and proposed course of defense compelling the payment of that sum by way of compromise. The claim was rejected by the Auditor, and exception to his decision overruled by the court.

Record, 237, 243, 244, 245, 246.

As to these facts:

Testimony of Roane: Record, 57, 58, 84, 85, 191, 192, 193, 196.
of Peck: Record, 185, 202.
of Denver: Record, 224, 237.

67. The firm had in its hands a claim of McDonald and

Fuller against the Government, in which the fee was to have been 10 per cent. Mr. Hughes (as the entry in the books of the firm show) referred Mr. Fuller to Chipman, Hosmer & Co., and that firm was employed from motives of expediency, and managed the case under a special contract made with them by Mr. Fuller, which was not to affect the fee to be paid Hughes, Denver & Peck. Fifty-nine thousand eight hundred and seventy dollars and ninety cents was recovered on the claim, and no fee was ever received on it by the firm. Mr. Hughes had given his note for $2,000 to Mr. Fuller, and when urged to pay the note, after Fuller's death, and when limitation had run against the note (in the summer of 1875) he refused to do so, on the ground that Mr. Fuller owed *him* (or, as he said to another person,) owed Hughes, Denver & Peck more than the amount of the note, and he never did pay the note.

The defendant claimed that his estate should be charged the whole fee of $5,987, as so much due to the firm by his neglect and by his use of it to avoid paying his note to Fuller. The claim was denied and the exceptions taken overruled.

Record, 224, 236.

Testimony of Pike: Record, 129, 130.
of Peck: Record, 89, 90.
of Denver: Record, 124, 140, 224, 236.

68. It was also claimed that the estate of Mr. Hughes should be charged with $400, fee lost by his neglect in the case of Charles H. Adams; and with $500 lost by his giving up the papers in the case of Susan A. Shelby. Both were disallowed, and the exceptions taken were overruled by the court.

Record, 224, 237.

69. The firm had 13 cases before the British and American Commission. All but one were lost. No attention whatever was paid to these cases by Mr. Hughes, and the de-

fendants claimed that his estate would be entitled to one-third of the fee in the single case gained, only after deduction of the losses of the firm, in the labor, time, and expense wasted and consumed in the other cases. The claim was denied, and exceptions to the ruling overruled.

Record, 224, 236.

Testimony of J. W. Denver: Record, 120.

of Peck: Record, 183.

70. Finally, as the decree of the court requires the surviving partners to carry on the business of the firm, (unless they abandon it,) until all cases are finally closed, and to pay to the executor of Hughes one fourth of all moneys which at any time hereafter they may receive, they claimed that there should be allowed them, to be deducted from such future receipts, and as costs and expenses of the business, in whole or in part, their probable expenses of living; but the Auditor refused to make any such allowance, and exception to his ruling therein was overruled by the court.

Record, 224, 237.

71. The final decree upon overruling the exceptions was that the defendants pay to the plaintiff, within sixty days, $43,592.45, "saving and reserving to the complainant from time to time the right to apply to this court for an order for the payment of such other and further sums of money as he may show have come to the hands of the defendants, from further collections, according to the principles of the original decree in this court, and according to the classification of the said report of the special Auditor."

Record, 246.

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§ 2.

ASSIGNMENT OF ERRORS.

The appellants specify and assign the following grounds of error and motives for reversal in this case, that is to say:

1. That the court below had no competency or jurisdiction to entertain a bill for such relief as is prayed by the bill in this case, nor to give such a decree as it hath given herein, whereby it attempts to settle and close the affairs of a partnership by decreeing specific sums as legally due, and if so demandable at law, and providing for the future continuance of the partnership and collection by virtue of its decree of other like sums until all the business of the partnership may end.

2. That the court below decided that the letter of James Hughes to James W. Denver of date 13th August, 1869, and the endorsements thereon by Charles F. Peck and James W. Denver, as the same are in proof in this case, constituted a valid and binding contract, and the law by which the affairs of the said partnership are to be closed and settled.

3. That the court below decided that the said James Hughes had not by his neglect and virtual abandonment of the business of the firm lost, at the time of his death and before, the right to demand the benefit of the said supposed contract so adjudged to have been made.

4. That the court below decided that the said James Hughes had not forfeited and lost his right to insist on the benefits of the said supposed contract by persistent violation and defiance of the stipulations of the said James W. Denver endorsed on the said letter of 13th August, 1869—he, the said James Hughes, constantly thereafter claiming and collecting one-third of all fees received or due, without permitting the partnership obligations to be satisfied, and while he was largely indebted to the firm, and the firm to said James W. Denver.

5. That in adjudging and decreeing that the said supposed contract was still valid and binding at and after the death of the said James Hughes, the said court necessarily

decided and adjudged that it was not affected by the demand of the said James W. Denver for a division of the business of the firm and the closing of all connections between himself and the said Hughes, and the assent of the said James Hughes thereto; and that the contract so adjudged to have been created was not abrogated by the said James Hughes himself by preferring to the supreme court of the District of Columbia charges of professional misconduct and personal dishonesty against the said James W. Denver, imputing infamy for the purpose of disbarring him, and thereby making it impossible for him to act under and carry out the said supposed contract by continuing to conduct and manage the business of the said firm or to be himself longer entitled to any benefit thereunder.

6. That the said court below erred in applying to such a partnership between lawyers and claim-agents, the principles of the law of commercial partnerships, in regard to the mode of settlement of the same after the death of a partner; and in regard to the neglect of the business of such a firm by a partner, and to the question of compensating the partners who, in case of such gross and shameful neglect are compelled to perform all the labor and be authors of all the earnings of the firm; and to the question, in the case of the death of one partner of such a firm, of compensation for the future labor, and the consumption of time and expenses of living of the survivors.

7. That the said court below erred in decreeing in effect that the business of the firm should continue during an indefinitely long period to be conducted by the surviving partners, for the benefit of the representatives of the deceased partner as well as themselves, when it should have ascertained the value of the business remaining, and decreed to be paid to the Executor of James Hughes only his fair propor-

tion of the value of the remaining business at the time of his death.

8. That the said court below erred by giving a decree which authorizes and entitles the Executor of the testament of James Hughes to compel the said James W. Denver and Charles F. Peck to continue to carry on, for his benefit more than their own, and at their own charge, with no charge upon him, the business of the firm, and to continue to manage and conduct to their termination the cases remaining in their hands; and in case of abandonment or neglect thereof by them, to hold them responsible in damages for bad faith.

9. That the said court below erred in this, that by the said decree it is made imperative on the said James W. Denver and Charles F. Peck to charge their clients for services of the said James Hughes since his death, and until their cases shall be ended, as if he were living and rendering such services; or out of what may be paid them for their services alone, to pay the said executor for services rendered by said Hughes since his death, as if he were still alive.

10. That the said court erred in decreeing and adjudging to the said executor one-third of the fee collected in the case of Gazaway B. Lamar against the United States, including the claim of D. A. Martin; when the said James Hughes had in his lifetime withdrawn from the said case and become a total stranger to it, and had denounced it to a Judge of the Court of Claims as fraudulent, scandalous, and corrupt, and the said client of the firm, Gazaway B. Lamar, as a rascal, and had declared that he would not be tainted by having anything to do with such a case or receiving fees therein.

11. That the said court erred in deciding that cases were nearly finished at the time of the death of the said James Hughes, which had then gone to judgment in the Court of

Claims; "and if appealed to the Supreme Court of the United States, the appeals withdrawn or dismissed after his death, without trial before the appellate court."

12. That the said court erred in deciding that the case of John L. Hardee was nearly finished at the time of the death of the said James Hughes, within the meaning of the said supposed contract.

13. That the said court erred in deciding that the case of Samuel G. Cabell was nearly finished at the time of the death of the said James Hughes, within the meaning of the said supposed contract.

14. That the said court erred in deciding that the cases of the Home Insurance Company of Savannah, and the Southern Insurance Company of Savannah, were nearly finished at the time of the death of the said James Hughes, within the meaning of the said supposed contract.

15. That the said court erred in deciding that the said appellants could not be allowed, as for losses of the firm to be deducted from its earnings and bequests, or as expenses to be so deducted, any sum for the time, labor and expense, employed, performed, incurred, and wholly lost in the several cases not gained before the British and American Commission.

16. That the said court erred in deciding that nothing should be charged against the estate of the said James Hughes, on account of fees due by McDonald and Fuller, wholly lost to the firm by act and neglect united of the said James Hughes.

17. That the said court erred in deciding that nothing should be charged against the estate of the said James Hughes for the moneys paid to Hunton and Chadwick, on account of the fees collected in the case of La Plante, or

for the fees lost by his neglect in the cases of Charles H. Adams and Susan A. Shelby.

18. That the said court erred in deciding, while decreeing to the said executor one-third of the fee of 10 per cent., paid by Gazaway B. Lamar to the appellants, in pursuance of an agreement made with them alone, that the estate of the said Hughes was not chargeable with any amount whatever on account of the loss sustained by the said firm, in the matter of the said fee, by his withdrawal from and abandonment of the said case.

19. That the said court erred in deciding that nothing should be allowed to the appellants, (working in their professsion and business, since the death of the said James Hughes, as well for his estate as for themselves,) for their time, labor and expenses of living; and that nothing shall be allowed them hereafter therefor, although it has decreed to the said executor one full third of nearly all the moneys received by them since the death of the said James Hughes, and one-fourth of all to be hereafter received.

20. That the said Supreme Court of the District of Columbia erred in not dismissing the said bill or making such a decree as would have put an end to all the partnership relations at once, as of the day of the death of the said James Hughes.

For all which errors the decree aforesaid should be reversed, annulled and wholly held for nought.

PIKE & JOHNSON,
Of Counsel.

§ 3.

POINTS OF LAW.

1. A bill is not maintainable in equity, by the executor of a deceased partner against the survivors of a firm of lawyers or claimants, to have such relief as is sought by the bill and granted by the decree in this case. For the decree does not end the partnership relations, nor close the partnership affairs, but virtually continues the partnership indefinitely, making the executor a sleeping partner, without labor, responsibility, or expense, or liability for losses.

2. This is not a suit to settle partnership accounts, as of the date of the testator's death; nor, if the business is to be continued for the joint benefit of the estate of the deceased partner and the survivors, has the time come in which the executor can call on the survivors for an account and settlement. The suit, as a suit for account and settlement, is premature, as the decree is radically erroneous.

3. It is, on the contrary, a suit to recover a specific portion of specific sums of money received by the survivors, and a specific portion of every sum that may be hereafter received by them, whenever it may be received. It is therefore precisely like a bill to recover a specific thing or part of a specific thing belonging to the partnership; which cannot be maintained. Every such claim as is here preferred being, if valid, a distinct and independent claim to the third or fourth part of each specific sum, not dependent on a general settlement, it is a merely legal claim for so much money due and owing under a contract; and equity has no jurisdiction to decree its payment.

4. The decree is not a decree to settle and close the affairs of the partnership; but for all practical purposes, *so far as*

it burdens the survivors, it *continues* the partnership, between them and the executor, but imposing on him none of the burdens of a partner. The work is to be done by the survivors, the expenses borne by them, and they are to divide their earnings with a sleeping partner, who has no burden of labor, care or responsibility imposed on him; and this partnership is to end only when all the business is in its natural course completed.

5. The executor of a deceased partner of a law firm has no right of action for half or a third of a particular fee received in a particular case, or for such share of two, three, ten or twenty such fees; as a commercial partner or his executor cannot sue for a particular share of the particular profit made on a particular adventure.

6. And that he has not, many considerations unite to prove. One may be presented thus: If one of three law partners dies, may not the survivors employ another in his stead, or are they compelled to do all the work themselves? May not justice to the clients demand the employment of a competent associate instead of the deceased one? Employing him, must *they* pay him out of their two-thirds of the fee? May they not pay him out of the third of the deceased partner? How, then, can his executor have action for that full third?

7. It is an engagement which all persons are under, who have *anything* in common among them, to come to a partition when any one of them desires it. If any one of them is desirous to have his portion to himself, it would be contrary to justice and to sound morals to force him to have it always undivided, since that would be a perpetual occasion of strife and contention among them.

PAUL: L. 70, ff. pro socio (Dig. 17, 2.)

ULPIAN: L. 26, §4, ff. de condict indeb. (Dig. 12, 6.)
DOMAT: Les lois civiles dans leur ordre naturel. Part ii, B. i, Tit. 4, No. 2740.

8. In Forman *v.* Homfray, 2 Ves. & Bea., 329, Lord Eldon said that he did not recollect an instance of a bill filed by one partner against the other, praying an account merely, and not a dissolution, proceeding on the foundation that the partnership was to continue. Sir Samuel Romilly admitted that it would be extremely difficult to produce any authority, and "the Lord Chancellor observed the inconvenience that, if a partner can come here for an account merely, pending the partnership, there seems to be nothing to prevent his coming annually;" and so refused the motion.

And the authorities establish that the courts "are not inclined to decree an account, unless under special circumstances, if there is not an actual or contemplated dissolution, *so that* ALL *the affairs of the partnership may be wound up.*"

1 Story, Eq. Jurisp. § 671, *n.* 3.

9. *Nemo præcisé ad factum potest cogi.* Can a court compel Denver and Peck to continue to conduct the cases in their charge, in order to earn the fees agreed on with their clients, for the special purpose of paying over a third or a fourth part of each fee, as it may be earned, to the executor of Hughes? If not, what *can* the court do but put an end at once to the partnership relations and wind up the affairs of the firm?

10. By the decree below, the partnership is continued in its most odious form. One partner is to do nothing, risk nothing, expend nothing, and demand *and sue for* his share of each fee when it has been earned and collected by the others. That is a *leonine* partnership, unequal and unjust. *Nemo invitus compellitur ad communionem. Ulpian: L.* 26, § 4, *ff. de condict. indeb.:* and Denver and Peck object to the further continuance of the partnership, and are willing to

pay to the executor whatever was the fair value of the interest of Hughes at his death, and no more.

11. And a decree that would compel two partners to continue for an indefinite period to work without assistance from a third, who had for years thrown all the burden of the joint business on them, and to share their earnings with him, would be far more contrary to justice and sound morals—a decree to shock the moral sense, inhuman, indefensible, unseemly, if discord had grown up between that one partner and the other two, and bitter enmity between him and one of them, acrimony and animosity, preventing personal intercourse; and if the one favored by the decree, and for whom it doomed the other to work, had preferred charges against him of professional misconduct, importing dishonor and infamy, and to take from him the power to continue to work.

12. Nor would a decree be much less censurable that should create relations so odious and sure to create perpetual occasion for strife and contention between the executor of him who had preferred such charges and also his partner and evidently always his partisan, when, in the same suit, grave provocations to anger have been offered, conflicting statements made under oath, and imputations of personal dishonor and dishonesty recklessly indulged in. It is not permitted to the tribunals of justice that they should force upon men alliances so unnatural, create relations so odious, subject honorable men to humiliating servitude and the peevish caprices of an overseer; denying to the surviving partners present settlement and complete cessation of all partnership relations and joint interests.

13. Such a decree as has been rendered in this case became impossible from the moment when, on the 10th of June, 1872, Mr. Hughes formally acceded to the explicit demand

of Mr. Denver that they should *separate*, and that the business relations between them should be definitely and finally closed at the earliest moment possible. It was like a final decree, with reference to the master to state an account. After that a court could do nothing to *continue* the relations. No bill could be filed except to carry out that agreement; no decree given that should not finally close and end such relations.

14. And if the abrogation was not complete then, it was made so by the charges preferred. *That* step "definitely and finally to close the business relations" between these parties, taken by Hughes, cut sheer through, and made them strangers to one another.

15. It is impossible that many of the rules established as to commercial partnerships *can* apply to partnerships of lawyers and claim agents. Principles that apply to contracts of one nature do not in general apply to contracts of a very different nature. A partnership of *workers* is *sui generis* and must have its own rules.

16. It is a general principle of the law of *commercial* partnerships that a court will not inquire, as between partners, in regard to inequality of services to the firm. But also, if one withdraws his *capital*, his interest in the firm ceases; and, therefore, when work and attention to the business is a more indispensable part of the capital than ability or learning, and where the work and labor are withdrawn *all* is withdrawn; and where there are no profits, but all that is to be divided is *earnings*, the partner who neglects the business and will not work, withdraws to that extent his capital; and this withdrawal *must* be taken into account.

17. But it is one of the conditions of every partnership that each partner shall give to the business of the firm the benefit of his knowledge, time, labor and attention, and

that neither will neglect the business. This need not be expressed. In the absence of any stipulations excusing a partner, and relieving him in whole or in part, the law makes this condition and term of the contract. The fact of partnership creates it.

Parsons: Partnership, * 223, 230.
Parsons: Contracts, * 166.
Const *vs.* Harris: 1 Turn. & Russ, 525.

18. Partners are united by a general engagement, in a sort of fraternity, to act the one for the other, as every one would do for himself; and they therefore owe reciprocally to one another an upright fidelity and integrity, besides which they owe their care for the affairs and effects of the community.

Domat: Des lois civiles, dans leur ordre naturel. Part 1, B. 1, tit. 8, sec. 4, art. 1, 2, Nos. 779, 780.

19. It is no more lawful for a partner to diminish the common stock than it is to break off from the partnership unfairly, and with a sinister view.

Domat: Lois Civiles, part 1, B. 1, tit. 8, sec. 4, No. 795.

20. There may be dereliction of duty so gross, on the part of a partner, as to justify the court in declaring the dissolution of the firm; and in such a case, if neglect so gross is shown as to amount to a breach of good faith and to be a fraud on the copartners, it will warrant a reference to a master to ascertain the value of the services of each, with a view to a decree that shall produce an equality between them.

Caldwell *vs.* Lieber, 7 Paige, 495.

21. Undoubtedly the law is that wherever there is a partnership, the presumption is, in the absence of proof of a special agreement, that the profits and losses are to be *equally*

shared, and that the court will not inquire into the inequality of labor or service. But this is because it may well be just that the profits should be shared equally, notwithstanding such inequality, which other circumstances are presumed to compensate, in the absence of a special agreement; and not because it is morally right that in an association of workers one shall be paid equally with the others when he grossly neglects the business and throws the great burden of the labor on his associates. For this conduct is faithless and fraudulent. The contract of partnership is a contract *bonâ fide*, and in it, as fully as in others, equality is equity.

Webster *vs.* Bray, 7 Hare, 159.

22. There may be such a repudiation of the articles of a partnership by gross and persistent neglect, abandonment of the office of the firm, and refusal to perform the duties of a partner, as will amount to throwing up one's rights as a partner. This may be by conduct or neglect. If one absents himself from the partnership, refuses to act as partner, or to perform the functions of a partner, or, virtually, to *be* a partner, *in fact* and *effect*, he may not unfairly be considered *as repudiating* the partnership.

Wilson *vs.* Johnstone, 16 Equity Cases, 606.

23. Such a deliberate and serious breach of the partnership contract, as might be considered equivalent to a repudiation of it altogether, is an implied release of the right to be a partner; if the neglect or misconduct be so deliberate, so continued, and so persisted in, as to amount to a determination to treat the partnership articles as a nullity, he who acts so as to show that he treats the articles as a nullity, *as regards his own obligation*, cannot complain if they are so treated for all purposes.

Wilson *v.* Johnstone, *ubi sup.*

24. It is of the essence of a partnership, that it can subsist

only so long as each of the partners continues in the intention of concurring personally, by his own labor, in this carrying on. Every partnership falls (*tombe*), by the fact, into dissolution, upon the instant when one of the partners determines to cease to act for that which concerns such common carrying on, and a demand for dissolution on his part has manifested this intention.

Bail v. Moulong & Brisson, 2 *Journ. du Pal. of* 1826: *Cour Royale of Lyon.*

25. There are cases in which it must be considered whether the plaintiff has not conceived himself at liberty to withhold more of his personal attention from the concern than he could withhold, entitling himself to call on the other partners to do their duty. If he chose to discharge his duty in a more limited way, whether that would not destroy his right to call upon them to do their duty towards him?

Const v. Harris, 1 *Turn. & Russ.*, 523.

26. A contract with carriers is a *personal* one. If a firm of lawyers are employed, the client has a right to the services of all the members. If one dies, the engagement is at an end, unless, *by its terms*, it is still to exist, and the business to be attended to by the survivors. For the services rendered during the continuance of the engagement, the *firm* is entitled to compensation; but by the death of one of the persons employed the engagement is determined, if its completion requires any exercise of professional skill.

McGill's Creditors *v.* McGill's Admrs., 2 Metcalf, Kentucky, Rep., 260.

Morgan *v.* Roberts, 38 Ill., 65.

27. Solicitors in partnership cannot dissolve their partnership as against a client, who, having employed them both, insists on the benefit of their united exertions. They cannot, without his consent, (for he has confided in their joint skill,)

dissolve, and turn him over to one of them. As between partners, they may divide their business; but they cannot be heard to say so in a court of justice.

Earl of Cholmondeley *v.* Lord Clinton, 19 Ves., 273.

28. In cases of partnership between attorneys and solicitors, the proper mode of settling their affairs is to fix the value of their business, when it consists of stewardships and offices, after making reasonable allowance for conducting it while the employment lasted, and to charge that value against the survivors.

Smith *v.* Mules, 9 Hare, 556.

29. A decree for dissolution puts an end to the joint trade between the partners. From that date it is incorrect to say that the partnership *continues*, though the trade is, in a certain sense, still carried on. Upon a dissolution, each partner is entitled to a return of his capital and equal division of the surplus, and there are no 'profits of the joint trade' after the dissolution; but, if the trade is still carried on, each partner has his *respective* capital in it.

Watney *v.* Wells, Law Rep., 2 Chancery Appeals, 252.

30. And so, when this firm was dissolved on the 18th of March, 1869, the persons who composed it were to continue, and did continue, to attend to the business simply as three persons employed to manage it: and if one chose to abandon it, or any part of it, nobody could prevent it. He would simply lose any claim to compensation.

31. A contract of retainer of attorneys as partners is a joint and continuing contract; and neither partner is released from its obligation, or the responsibility which they had thereby assumed, by a dissolution, or by any agreement between themselves.

Walker *v.* Goodrich, 16 Ill., 341.

32. A dissolution of partnership subsisting between attorneys has reference to new business to be undertaken, and does not affect engagements already made, so far, at least, as their clients are concerned. * * * This is imperiously demanded by the rights of suitor.

A party retaining two attorneys who are partners, is entitled to look to both for faithful performance after dissolution.

Walker *v.* Goodrich, 16 Ill., 341.
Smyth *v.* Harvie, 31 Ill., 62.

33. A partner dying, his estate, in case of such a partnership, cannot be entitled to an equal share of the future earnings of the survivors; but it is entitled only to his share of the earnings up to the moment of his death—*i. e.*, to his equal share of the value of the services of all, up to that time; and that value is what, if then discharged, the services of the firm would have entitled it to up to the moment of his death, considered as so much of the services that were to earn the whole fee or compensation.

34. For the survivors may at once, of their own accord, give the business up, and elect to settle the partnership affairs finally, as of that date, leaving the clients free to re-employ them or to employ others, as they may see fit. As, in either case, the clients would be liable only for the value of the services rendered up to that time, the estate of the deceased partner can be entitled to no more; and what the cash value of such services is can be as easily ascertained in one case as in the other.

35. The surviving partners of Mr. Hughes cannot, for any business that remained in their hands unfinished at his death, righteously charge their clients for any other services than their own, and, therefore, cannot receive anything from

them to which his estate can have any claim. There is no moral obligation in any code of morals ever known that makes it a duty for the surviving partners in this case, under the circumstances which it presents, to continue to labor for the benefit of the estate of James Hughes, earning money to give unto his representatives.

36. That sort of claim might quite as justly be made by the estate of one of a firm of three seamstresses having large and continuing contracts for making shirts, unfinished at the time of the death of that one of them. Apply the facts of this case—the dissolution, the pretended contract, the subsequent removal from the place of the joint labor, and the utter neglect of the business, to such a firm of women—and the unreasonableness of the executor's claim here, and the absurdity of the idle notion that the rules which govern commercial partnerships apply to a firm of workers, all whose receipts are earnings of work, will plainly appear.

37. The engagements of the firm with its clients end by his death, and if the survivors continue to attend to the cases entrusted to the firm, they do so under a new engagement, in which his estate has no interest. His estate is entitled to be paid for the services he has rendered in all the business, for the full, fair value of his work, labor, application of knowledge, and intellect, comparing his services with those of the other partners.

38. The client in every case in the hands of the firm has the undoubted right to employ another lawyer in place of the deceased partner, to act with the survivors, and to pay to him all that the deceased partner, if he had not died, would have earned or been entitled to for his services from the day on which he did die—*i. e.*, his share of the whole fee less the value of his services up to the time of his death, or, in practice, his share less what it would cost to employ another

in his stead. Of course his interest in the fee, except for the value of his past services, ends with his death.

39. The surviving partners, continuing in charge of the case or cases, have a perfect right, *and it will often be their duty to their client*, to employ other counsel to take the place of their deceased partner, and in that case his estate would be entitled only to so much as his share of the whole fee would have been, if he had lived until the end of the service, less the compensation of the new counsel employed in his stead.

40. There *is* no rule of the court of equity, applicable alike to all cases of settlement of partnership transactions, when one partner has died. There is no rule so established or so general in its application, that it is to be taken as the *general* rule, until circumstances shown to displace it. The facts of such case must be fully brought under the view of the Court, before it can be in a position to determine what justice to the party seeking its protection may require, with due regard to the interests and the rights of other parties. The value of the stock in trade, the amount of capital or current profits, at the time of the deceased partner's death, how far the good will constituted its value, to what extent the successful prosecution of the business was dependent on the personal skill or attention of either partner, or on new capital brought in since his death, and other facts, must be considered in arriving at conclusions as to what justice and good sense demand.

Willett *v.* Blanford, 1 Hare, 260.

41. If there were no stock in trade, no capital but the intellectual and physical abilities of the partners, no current profits at the deceased partner's death, except unearned, or in part earned fees, no good will of the business, and the successful prosecution of it were *wholly* dependent on the

personal skill and attention and *work* of each partner, or on new capital of learning, ability, and labor, in the person of a new associate, brought in since the death, no court, one would suppose, *could* go so far astray as to undertake to settle the affairs of such a partnership as the affairs of ordinary commercial partnership are settled.

42. In business where the profit is made by the personal activity and attention with which the use of the money capital is directed, the case may require a very different determination.

Willett *vs.* Blanford, *ubi sup.*

43. If a deceased partner had abstracted or borrowed more than the amount of his property in the concern, it would be anything but justice to hold that his right to share profits continued as if his accounts with the partnership were adjusted, *and he had given his time and attention to the business.*

Willett *vs.* Blanford, *ubi sup.*

44. Mr. Hughes abstracted the capital he put in, in the exact proportion in which he failed to do his fair share of the work. He left a very insignificant fraction of his part of the capital in the concern, and he *always* received more than his full share of the earnings. It would be anything but justice to give to his estate what has been earned exclusively by the labor, skill, diligence, and attention of his partners and survivors.

45. When a partner of a firm of attorneys or claim agents gives no attention to the business, where his attention to it is needed, the clients do not receive all the service that they contracted for, and therefore the firm has no right to charge them for so much of the service stipulated for as they have not received.

46. As the firm is not entitled to any fee for compensation for services that one partner should have rendered and did not, the partner who gives no attention to the business, when his attention is needed, cannot be entitled to demand any compensation from them.

47. He may, by such neglect or inattention, justify the discharge of the firm by the client, and even an action by him against it, for any compensation paid it, or for injury sustained in consequence of the neglect or inattention of that one partner.

48. After the dissolution of such a partnership, one partner cannot abandon and wholly neglect the business of the firm, without also abandoning all claim to compensation on account of the cases or business neglected, because the others who were his partners may employ another in his stead, or the client may refuse to pay anything on account of *his* services.

49. When a partner dies, his executor or heir cannot become a partner in his stead. If, where there is a *contract* to do a certain work, by which the contractors may make, gain, or sustain loss, and one co-contractor dies, his estate becomes co-contractor in his stead, entitled to receive his share of the profits, liable for his share of losses, bound to contribute equally to expenses and advances, (as was held in McClean *vs.* Kennard, 9 Chancery Appeals, 336,) there is no such law or consequence in the case of a law partnership.

50. And it is permissible to doubt whether that doctrine is not erroneous; whether, in *any* case of partnership, the estate succeeds to the interest in the contracts made by the partnership, which the deceased partner had, so as to be co-contractor in his stead. We know of no principle of law by which it can be held that the representatives of a deceased

partner, engaged in such a contract, can claim to be admitted to the partnership and to fill the place of the deceased.

Sir James Bacon, V. C., in McClean *vs.* Kennard, 9 Chancery Appeals, 336.

Ulpian: L. 35, Dig. 17, 2, (ff. *pro socio.*)

Pomponius: L. 40, Dig. 17, 2, (ff. *pro socio.*)

L. 59, princip. same title.

51. When one partner of a firm of lawyers dies, the client cannot be charged for the benefit of his estate, for any part of any service rendered afterwards by the others; but may consider their employment at an end and employ other counsel, or continue the employment of the survivors alone or associate other counsel with them in his stead.

52. When, upon a dissolution, one partner immediately withdraws his capital he can have no sort of interest in the trade afterwards carried on by the others. It is no longer *res communis.*

53. Where the capital of the firm consists of the knowledge, ability, skill, industry, labor, and attention of the partners to the business of others, if one partner abandons or wholly neglects the business, he wholly withdraws his capital, and the others work for their own benefit thereafter, and not for his.

54. In case of such a partnership the capital of a deceased partner is withdrawn at the moment of his death, if not before; and the business is afterwards carried on with the capital of the others and for their profit alone.

55. As the fees and compensation of lawyers and claim agents are supposed in law to be the exact equivalents of the service, labor, and skill bestowed and employed in the business of the client, and anything beyond that value is extortion, there are no *profits*, but only *earnings;* and when

one, abandoning or neglecting the business, *earns* nothing, he is entitled to nothing.

56. Upon the same principle, when one dies, there are no future profits in which his estate can share, and therefore it is entitled to nothing on account of earnings after his death.

57. After the dissolution of this firm in March, 1869, and the agreement that each should continue to give his personal attention to the business of the firm, as if they were still partners, and as if still governed by the partnership articles, there was no *joint* capital of skill, knowledge and labor; but each partner engaged in the business his own respective capital, and one who ceased to furnish it could claim no share of the earnings.

58. The letter of August 13, 1869, and the endorsements upon it, did not create a contract.

It is an undeniable principle of the law of contracts, that an *offer* of a bargain by one person to another, imposes no obligation upon the former until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of or departure from these terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation on either.

Eliason *vs.* Henshaw, 4 Wheaton, 225.

59. The Roman law, on the subject of stipulations, said: "If one, interrogated simply, shall respond, *If such a thing shall be done, I will give*, it is settled that he is not obligated. For he did not so respond as he was questioned." [The question, or *stipulation*, being, *Will you give such a thing?*] When he adds anything to or takes anything from the ob-

ligation, it is always to be held that the obligation is destroyed, unless the variance of the response is on the spot agreed to by the stipulator, for then a different stipulation is deemed to be created.

Ulpian: L. 1, § 3, ff, de verb. oblig., (Dig. 45; 1.)

60. It is idle to say that that which Mr. Denver insisted should be understood, and to which his counter-stipulation demanded that Mr. Hughes should agree, was only what the law had enacted for the parties. If the stipulation had demanded assent to an *unlawful* proposition, it would have been void, but it was not idle because it demanded a *promise* to do what the law already required. It was but a mode of saying, "I give my assent on condition that you will not do what the law does not permit, to my injury. Do you agree to that? If not, or if you do, and afterwards break your promise, my assent is, or shall be nought."

61. If the letter and endorsements constituted a contract, Mr. Hughes repudiated and annulled it by repeated and uniform violations of the addition proposed, or condition stipulated, by his partner, which he never once regarded, thereby refusing to pay to Mr. Denver the one-third of a debt due him by the firm of $7,000, and making null the assent of the latter.

62. If the letter and endorsements constituted a contract, all right under it could be forfeited, and was forfeited, by Mr. Hughes, by continuous, uninterrupted, persistent, gross negligence, inattention to the business, abandonment of the office, and refusal to assist his partners, so gross as to amount to a fraud upon both them and the clients of the firm. In all partnerships, whether it be so expressed in the articles or not, the partners are bound to be true and faithful to each other. And when one claims the benefit of any agreement between them as to division of profits or earn-

ings, it must be considered whether he has not conceived himself at liberty to withhold more of his personal attention from the concern than he *could* withhold, and still be entitled to demand of the other partners compliance with the agreement. If he has chosen to discharge his duty in a more limited way, whether that will not destroy his right to call upon them to do their duty towards him? Though there is a written agreement, nothing is more clear than that if there has been a long course of dealing, or one *not* long, but still *so* long as to demonstrate that they have all agreed to change the terms, they may be held to have changed them by conduct.

Const *v.* Harris, 1 Turn. & Russ., 523.

63. And as to waiver of agreements, see
Geddes *v.* Wallace, 2 Bligh, 270.
Jackson *v.* Sedgwick, 1 Swanst., 469.

64. If the letter and endorsements constituted a contract, it was abrogated and rescinded from the moment when Mr. Hughes formally acceded to the demand of Mr. Denver that the business-relations between them should be definitely and finally closed. As when a final decree is entered, nothing remained but to carry *this* agreement into effect. If any step remained to be taken, Mr. Hughes took it when he preferred the charges against Mr. Denver, by which he demanded that he should be disbarred, and thereby rendered incompetent and incapable to attend further to the business of the firm, and by which he incapacitated himself to demand that he *should* do it, either for his benefit while living or for the benefit of his estate after his death.

65. When one of a firm of lawyers or claim-agents dies, the rule for settlement must be that, as to fees wholly earned and due at the time of his death (if by neglect or misconduct he has not forfeited or lessened his right,) his estate is

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66. If the business of a law firm (the fees being contingent on success) is attended to wholly or chiefly by two of three partners, or, after the death of one, by the survivors, and of several cases they lose one or all except one, the time and labor uselessly employed and wasted on these cases, and all expenses incurred in them, are *losses* of the firm, of which the inactive partner or the estate or executor of the deceased one must bear the same part as he is entitled to have of the fees in the cases gained.

67. In case of the abandonment of the business by one partner, or of his death, the expenses of living of the laboring or surviving partners, while the business continues, and of their families, are, in whole or in part, according as they do or do not engage in other business, *societatis impensûs*, to which the inactive partner or the executor must contribute. A man must live by his work. If the surviving partners work for the firm alone the firm-business must support them; if in part, it must support them in part by proportional contribution. The executor, heir, or estate, not

working in the business of the firm, has no claim to be supported by it. It is said that the laborer is worthy of his hire. The Hebrews were forbidden to muzzle the ox that trod out the corn. The executor's unpaid thralls ought at least to have their sustenance out of their earnings before dividing with their master—overseer—driver.

68. It is not true that there is any such general rule as that a surviving partner, carrying on the business (which he always carries on as trustee) is not entitled to any additional or special compensation. There are many cases in which, to make it a rule, would be worse than robbery. Lord Elden declared that he never said so.

Cook *vs.* Collingridge, Jacob, 602.

69. When one of the partners of a law-firm, in a case in which the fee is wholly contingent, and the amount of it not determined upon, quarrels with the client, and, denouncing his client as a rascal and the claim as fraudulent to one of the judges of the court in which the case is pending, asks leave to withdraw his name as counsel in the case, protesting that he will not be tainted by having anything to do with it, or receiving fees in it, after notifying one of his partners of his intention to do so; when the leave is granted by the court, and he thereupon abandons the case, and never afterwards has the least connection with it, when the other partners have continued to attend to the case, have contracted with the client for a fee one-third less than the firm had always insisted on, and, having gained the case, have collected the fee agreed upon, the executor of the will of the partner who abandoned the case can have no manner of claim to any part of this fee.

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70. When Mr. Hughes withdrew from the suit of Lamar, as an individual, had his name as counsel taken from the record, and after that could not appear for him in the Court

of Claims, he withdrew from it as one of the dissolved firm of Hughes, Denver and Peck also. He could not be at once out of the case and in it as counsel; out of it as James Hughes—in it as James Hughes, ex-member of the firm of Hughes, Denver, and Peck. He did not abandon in merely a Pickwickian sense. He could not denounce Lamar as a rascal, and the claim as fraudulent, as James Hughes the individual, and have connection with it, sustain it, assist in giving it success, and *not* be tainted by it, as ex-partner of Messrs. Denver and Hughes.

71. And he could not *hedge* against this consequence by writing a private memorandum to the effect that he withdrew from the case, but reserved his right to compensation, and by long after, when the case had been gained, having the same thing entered on the diary of Hughes, Roane and Middleton.

72. In such a case, the abandoned partners could not ask the clients to pay them anything for one who had not only refused to continue in the case as counsel, but had endeavored to prevent recovery by denunciation of him and his cause; and they were under no obligation to do it if they could, nor to collect anything for one who had endeavored to prevent their winning the case and securing any fee. If he had any claim, it was against Lamar. He surely had none of any kind against *them*.

73. As they could not collect or exact anything for his services, the firm, if he continued interested in the fee, lost by his withdrawal precisely what it would have claimed, more than his partners afterwards contracted for, if he had not withdrawn. The firm had all the time demanded 15 per cent. and did not intend to accept any agreement to pay 10, preferring to have none, and to submit it to the Court to decide what ought to be allowed. Therefore, if he had

not withdrawn, each would have had 5 per cent. If the decree can stand, each received $3\frac{1}{3}$ per cent., and his estate owes each of them $1\frac{2}{3}$ per cent., *i. e.*, 5 per cent. to the firm, lost by his withdrawal; *for which the executor has not attempted to show any* GOOD *cause or reason*, nor *any* cause or reason, except that he and Lamar had had a quarrel. As far as the proof goes, Mr. Hughes was *wholly* in fault, for he had neglected the case, and Lamar was justly dissatisfied with him.

ARGUMENT.

§ 1.

As all the questions, general and particular, in this case depend for their solution upon the nature of a law and claims partnership, and the rights and duties of the partners, it is proper to consider these at the beginning, although the first question presented by the record is, whether such a bill was maintainable for such a decree as the Court below has given.

In the ever-increasing diversity of men's pursuits in our modern life, men more and more associate themselves, uniting their wealth, credit, knowledge, industry, wits, or knavish shrewdness; their ingenuities to devise schemes for plundering the many for their own benefit; their daring boldness in adventurous speculation.

Thus partnerships are being continually formed for new purposes, in many of which no *capital*, in the usual sense of the word, is employed, *i. e.*, no money, merchandise, or *bona* of any kind, but only knowledge, labor, skill, ingenuity, or other means by which men acquire wealth. There are, or may be, partnerships for banking, insuring, working mines, carrying on a trade, industry, or profession for honest or dishonest speculation, with no other capital than shrewdness and industry, or knavish shrewdness and impudence, for

prosecuting claims, for lobbying measures through Congress, between lawyers, physicians, dentists, actors, dancers, Chinese diggers for gold, and, if they see fit, lecturers and divines.

But while these partnerships have grown numerous, the varying relations of the partners requiring new applications of the principles of justice and good sense, out of which the law of partnership has grown, that law continues to be the same, the courts having hardly begun to discover that the law of commercial partnership must, in many respects, be *not* the law of partnership for labor, of professional men and others.

The relations created between men who unite to earn money, by teaching, practising medicine, practising law, prosecuting claims, and other avocations in which the personal abilities and energies of the parties and their *work* are the only capital, must be in many respects very different, *essentially* different from those between men who engage together in mercantile business or enterprise, or in others, requiring, as these do, the use of joint capital of money or other wealth.

If a court shuts its eyes, and to a partnership of this kind applies at hazard the principles that govern in commercial partnerships, it will not much enrich or enlarge the jurisprudence, which can only grow as the needs for it increase, of by applying the conclusions of reason, justice and plain common sense to new cases as they arise in the ever-increasing complications of human affairs.

The learned counsel for the executor said, before the arbitrators, in reply to our remark, that we had succeeded in finding very little in the books upon the subject of such partnerships, that *he* had met with no difficulty in finding abundant authority, and proceeded to repeat certain trite principles, known to all the world, of the law of partnerships of commerce.

Law is law, no doubt; but people do not now apply the

primitive English law in regard to assignments of choses in action, to promissory notes and bills of exchange. Any sort of law may not be good enough for a given case, if judges can be made to see it. A principle that is equitable in one case may be mere iniquity in another. The courts have said that if the business of a commercial partnership is carried on by the survivors, after the death of one partner, those who carry it on will be entitled to no compensation for labor, service, &c., in doing so.

Why? Because the capital of the deceased partner remains in the firm; the survivors may, if they choose, at once wind up the business, and return the capital of the deceased to his representatives.

Now, suppose that some Dogberry should say the same thing in regard to a partnership of three lawyers, where one had died when fifty or a hundred cases were being commenced in the courts, to last, many of them, a quarter of a century. Suppose he should apply to such a case the law of commercial partnership, *as he understood or misunderstood it*, and decide that—

1. The surviving partners must continue to carry on the business until it shall be all closed and ended.

2. Nothing shall be allowed them for their labor or time. They shall have two-thirds of the receipts, and therewith live, if they can.

3. The representatives of the survivor shall do nothing in the business, and his heirs shall have no expense or trouble. They shall live in idleness, watching for the earning and collection of fees by their bondmen, the survivors, and of all collected shall have their full one-third, without deduction or diminution, as long as the business lasts.

4. If the survivors are compelled to take another associate in lieu of the deceased, to do the work he would have been bound to do if he had not died, or if they are com-

pelled to employ assistance in his stead in particular cases, they must pay all out of their own two-thirds, and the third for the hereditary sangsues shall remain intact. And if a client refuses to pay for the services of one who, being dead, can render none, and, employing other counsel in his stead, will pay the survivors but two-thirds of the fee stipulated by the firm, as all that *their* labor and service entitle them to, they shall still share with the executor or widow, sons or daughters, of the deceased, paying over to them a full third of all that they receive.

It would be a very simple and easy thing to decide all this. It would not overwork the brain or strain the intellect. It would be, in fact, the easiest and simplest thing in the world to take certain rules of the law of commercial partnerships and misapply them, as quacks administer cathartics, to partnerships of another kind, applied to which they become ludicrous, or would be if they did not become iniquitous.

It is quite evident that jurisprudence would soon cease to advance, cease to be a science, cease to be respectable, if that kind of decision were to become general, and principles of law were generally regarded as of equal value and justice, whether applied or misapplied to cases.

The court below gave no *reasons* for its decision, as its single judge in equity had given none. When a court makes no reply to the propositions of counsel, respectfully made, it is an imputation that they deserve no reply or notice. A court may forfeit its claims to courtesy, as an individual may, and warrant counsel in saying that if it would have its decisions respected it must make them respectable.

The court below has decided what we have epitomized in preceding paragraphs, and it has even decided more and worse. The court is able, learned, impartial, all that one could desire in a court, not crotchety or peevish, or apt to form its opinions and come to its conclusions, and then hear

argument; but its decision in this case, just subject of criticism, is not of great authority. Blindly to apply the law of one kind of partnership to another kind, to which it is ludicrously inapplicable, and when its application is supremely unjust and iniquitous, is easy, but not laudable: is not the adjudication of reason, but irrational routine, which, Marcadé says, is the Supreme Power in the world.

Those of us who have grown gray in the service of the law care more to have cases decided rightly than to win them, if we deserve to be called lawyers.. We wish to help the law to become more and more a science, more and more the discriminating application of sound principles to the affairs of men and the ever-varying cases of new impression that arise; more and more the true interpreter, and not the blinking slave of imagined authority.

The Subtilities, or fine and nice distinctions of the law, a Roman jurisconsult said, are those upon which most rights of litigants depend, and by the aid of which alone controversies can be justly decided; and Justinian says, in his first preface to the Pandects, *Qui non subtiliter factum emendat, laudabilior est eo qui primus invenit.*

Dicunt, Terentius says, *jus summum sæpe summa est malitia;* and very certainly it is less by the application of false principles of law to cases, than by the misapplication of true ones, less by ill intention and prejudice than by incapacity to see the distinctions required by reason, that injustice is judicially perpetrated.

It is a very true saying of Cicero: *Ita enim finitima sunfalsa veris, ut in præcipitem locum non debeat se sapiens committere.* It is the prerogative of the bar to confuse the two; it is the splendid prerogative of the tribunals to distinguish one from the other, and in every case with nice and subtile judgment to discern all the shades of difference between it and others, and uphold in it the sovereignty of reason, justice, equity, and logic.

The highest courts must not look wholly to what we call

authorities. It is their right to be the *authors* of jurisprudence. To the case before them, what has been adjudged may often seem to apply when it does not; and to follow what appears to be authority may be the greatest error. The *legum auctoritas* is defined by Justinian as that *quæ et divinas et humanas res benè disponit, et omnem iniquitatem expellit:* and he said to his Quæstor, Tribonianus, *sed nequè ex multitudine auctorum, quod melius et æquius est, judicatote: cùm possit unius forsitan et deterioris sententia, et multas et majores in aliquâ parte superare.*

Non desperamus, he said to the Senate, in the 2d Preface to the Pandects, § 13, *quædam posteà emergi negotia, quæ adhuc legum laqueis non sunt innodata.* In such new cases, arising continually, as he foresaw they would, recourse must needs be had to those first principles by the application whereof jurisprudence has grown into a science, in countries where principles and reason are not subordinated to the doctrine *stare decisis.*

The books contain very little in regard to law-partnerships. There being in them no capital of land or personalty or credit, they are only *quasi* partnerships, to which little of the law of partnerships applies.

A partnership of lawyers is merely a union of workers. If three Irishmen were to agree to go to Englaed together and mow in partnership together, dividing equally the pay or wages received, that would be as much a partnership as one of lawyers, for these, too, only unite together to work, and divide equally or unequally what they earn.

The *capital* of a partnership of lawyers is composed:

1st. Of the reputation, influence, and acquaintance of each, and whatever else in and about each brings business to the firm.

2d. Of the learning, ability, industry, eloquence, fidelity,

and zeal of each; his business capacity and power of dispatching work.

3d. Of his actual labor and punctual and efficient attention to the business.

And when one partner ceases to furnish this labor and attention, he ceases to furnish all the rest, and so withdraws the *whole* capital that he had put into the firm.

The productions of the intellect, or the right to sell them, may constitute the capital of one of the partners. So may manual or intellectual industry, experience in the arts and sciences, skill in affairs, the physical force that is the means of action; and, in general, everything that turns to the advantage of the partnership, and which is susceptible of appreciation. *Malepeyre & Jourdain, Traité des Sociétés Commerciales, No.* 60.

In societatis contractibus fides EXUBERET (in contracts of partnership let good faith *abound*) says the code of Justinian, iv. 37, 3.

In a partnership of commerce where one's capital of money is in the business, and is making profits for the firm, it may or may not be very bad faith in one partner to be inattentive to the business of the partnership, and decline its labors.

But when the firm is to *earn*, by *work* alone, and there is no *moneyed* capital, nor can be any *profits*, but *only* earnings, then, if one partner, under any pretence whatever, refuses to take upon himself his fair share of the burthens, if he eschews the work, imposes it on his partners, does a little easy labor now and then, a few days only in each year, and for the rest lies idle or indulges his tastes and whims and appetites while they toil and drudge, he acts in the most extreme bad faith; and such a course, long and systematically persisted in, is intolerable, neither decent or honest.

No man can, persistently acting in bad faith, claim that

compensation, remuneration, or share of earnings or wages to which only entire good faith can give him a title and a right.

Societas jus quodammodo fraternitatis in se habet.—*Ulpian*, *L.* 63, *princ. ff., pro. socio*, (*Dig.* 17, 2, 63, *princip.;*) and the stringency of the obligations of good faith is in exact proportion to the intimacy of the association.

And if such a partnership is virtually to continue for years after the death of a partner, (which is exactly what the court below has decreed,) then the most perfect good faith, in the punctual and efficient performance of his full share of duty and labor, by such partner during his life time, is so much the more expressly required, and utter disregard of it becomes in its consequences, and is in its nature, *fraud.*

The Royal Court of Lyons, on the 18th of May, 1823, in *Bail* vs. *Moulong and Brisson*, 2 *Journ. du Pal.*, of 1826, speaking of a commercial partnership *en nom collectif*, said: "It consists, on the part of those between whom it is formed, in carrying on commerce in common under a firm designation—commerce, in the carrying on whereof, each of them binds himself to participate; and it is clear that it is of the essence of such a partnership that it can subsist only so long as each of the partners continues in the intention of concurring personally, by his own labors, in this carrying on, for which all the members of the partnership have promised to put in common their activity and their industry. Inasmuch, then, as every partnership *en nom collectif* must necessarily be dissolved, or, rather, it falls, (*tombe*,) by the fact, into dissolution upon the instant when one of the partners determines to cease to act for that which concerns the said common carrying on, and a demand for dissolution, on his part, has manifested this intention; that so, and as it is impossible for the dissident partner to be compelled to participate in the partnership operations, by this personal concurrence which he refuses, it is true to say

that the partnership then ends by the will of one of the partners."

Callistratus says (*L.* 64, *ff.*, *pro socio*, *Dig.*, 17, 2, 64;) *Itaque cùm separatim socii agere cœperint, et unusquisque eorum sibi negotietur, sine dubio jus societatis dissolvitur.*

A partnership formed without writing can be dissolved without writing. If, before an agreement to dissolve, Mr. Hughes had abandoned the office of the firm, opened an office of his own, and formed a new partnership, that would, *ipso facto*, have dissolved the old one; and if he abandoned the business also, he abandoned the right to fees, except in the few cases that he did attend to. There is the simplest and most conclusive reason possible for this. The client is entitled to the services of all. The abandoned partners are under no obligation to the recreant one to do his share of the work or protect his interests, but they *are* under obligations of the most sacred kind to protect to the fullest extent the interests of the clients, *and give them all the service, for the stipulated fee, that the firm agreed to give;* wherefore it is their duty to employ other equally competent counsel in the place and lieu of him who has deserted the business, and pay the new associate what the recreant one has refused to earn; and if, instead, they themselves do his work, they are entitled to all the earnings.

The partnership formed between James Hughes, James W. Denver, and Charles F. Peck, without written articles, was an equal one in all respects, and imported a conclusive admission of equality of usefulness among the partners. It must have been known to the complainant and his counsel that the law would not permit an inquiry into pretensions of superiority of intellect, learning, or reputation on their part for James Hughes, and therefore that it was not decent in such a suit, to allege such a superiority. The answers give explicit responsive denial to the allegations in the bill of that superiority, and no attempt is made to overturn these denials by proof. Yet it has pleased one of the learned

counsel to say in print, without any proof to warrant it, "Judge Hughes was the senior member of the firm. General Denver, although a highly respectable gentleman, was not known to the country as a lawyer, nor in connection with judical proceedings; and Mr. Peck, although now justly prominent in his profession, was at the formation of this copartnership comparatively young and unknown. Without meaning the slightest disrespect to General Denver or Mr. Peck, I think I am fully warranted in saying that until they had become known and established they could well have afforded to give Judge Hughes an equal share of the the fees if he had done nothing but loaned them the use of his name."

And the executor sees fit to say of his testator and the appellants that *he* organized the firm, that *he* brought both of them into it, and that to *his* reputation, professional skill, political influence and generosity they are chiefly indebted for the fortunes they have amassed. But the executor is fond of arguing in his testimony, and of testifying in argument.

No one desires to asperse the character or to disparage or underrate his ability, learning, or reputation. It was necessary that we should allege and prove his gross and habitual negligence and inattention, his imposing upon his partners nearly all the labor demanded by the business of the firm. That called for no explosion of indignation. If "caparisons are odorous," they were very unfitly and uselessly and very offensively instituted in the bill, and still more so in the argument of the executor's counsel.

When it was attempted to claim a superiority over his partners for Mr. Hughes, because he had been a judge in Indiana, a member of Congress, and a judge of the Court of Claims, and hence to deduce the conclusion that he had won an enviable reputation, and was known and honored everywhere, and thereby attracted to the firm nearly all its valuable business, it was natural that, without deeming it

necessary to say anything as to the widespread distinction gained by a judgeship in Indiana and membership of the Lower House of Congress, we should look to the record of his service in the Court of Claims, and remark, not "facetiously," but with perfect gravity, that it appeared by the Reports of that Tribunal, that he *was* a judge there from October in one year after its re-organization to December in the next year; and that during that time he delivered *one* opinion, as to the amount and calculation of damages in a case; announced that another was settled by a former case; and in one other dissented, giving no written opinion; and that in several he did not sit.

A magistrate on the bench may gain a kind of reputation by merely being on it. So a man may, by being a member of the Lower House of Congress. But when superiority over others, associated with him as equals, is offensively claimed for him because of his having been such judge, it is surely not aspersive of his character to state precisely what the record shows him to have done as judge, and that he did nothing there to earn a reputation for ability or learning, or even ordinary industry.

To say that Messrs. Denver and Peck *could well have afforded* to *give* Mr. Hughes an equal share of the fees, *for loaning them the use of his name*, if he did nothing else, until they had become *known* and *established*, was not disrespectfully intended, the learned counsel before the arbitrators assured us. But *contumelia, si petulantius jactatur, convicium nominatur.* We might reply to it by asking where the proof is that Mr. Hughes had greater ability or larger learning than either of his partners, or was more widely known or crowned with peculiar laurels? One of his partners (it is matter of history) had been also a member of the Lower House of Congress, and moreover Governor of a Territory, Commissioner of Indian Affairs, and Major General in the Army of the United States, and was much more widely known than Mr. Hughes.

It was inquired of one of our witnesses, who had been employed in aid of the firm in many cases, whether he was professionally a lawyer. Yet the executor, who proclaims that he is not even nominally a lawyer, tells us that *he* prepared fifteen or twenty, or twenty or thirty briefs, for Judge Hughrs.

All this, and much more, that has found its way into the case, is very idle matter, with which to make tumid a record. The partnership in this case was formed for the prosecution of claims, a business in which one may be very effective, without being a learned and able lawyer. Diligence, industry, energy, a character compelling respect, gravity and sobriety have made more claim-agents rich than knowledge of the law: *Consilio, auctoritate, sententiâ, res magnæ geruntur.*

We claim that gross negligence and inattention of a partner of such a firm as that was, between whose members this controversy has arisen, *must* be taken into consideration in judicial settlement of the partnership affairs and division of the earnings of the firm; and that, after the partnership was dissolved, there were such willful negligence, gross neglect and constant casting of the labors of the firm on his partners' shoulders on the part of Mr. Hughes, as to amount, virtually, to almost total abandonment of the business of the firm, and to inexcusable bad faith.

The partnership was dissolved on the 18th of March, 1869. It was provided by the article of dissolution:

1st. That no new business should be received in partnership, but each member should be at liberty to receive and transact business on his own account.

2d. That all new business coming by mail to the firm should be equitably divided between the three parties.

3d. That the business before received, and on hand, should "*be closed up* as rapidly as possible *by the members* of the

firm, *as partners*," under their original terms of association, and in the firm name.

The 4th provision is only as to entries in the books.

If the effect of the 3d disposition was to continue the firm in being, as to all the existing business of the firm, until it should be closed; also its effect was to require each to do his *whole* duty as a partner, in regard to it all.

And it certainly did not permit the ordinary characteristics of a partnership to disappear. The firm still kept a common office, which was the domicil of its business. There each was bound to be, whenever the business required it, there to be ready to consult, to act, to write; and neither of the partners could, without the consent of the others, leave and abandon it, and set up an office elsewhere. Denver and Peck were no more bound to keep the office than Hughes was.

When the accounts of a partnership are settled, they are settled, as partnership accounts, only up to the time of the dissolution. Profits afterwards made are taken into the account, but the accounts after dissolution are not partnership accounts.

Whether the partnership was *dissolved* on the 18th of March, 1869, or, as to the actual business, continued, is probably of no importance. The intention was to dissolve. Mr. Peck demanded a dissolution, and Mr. Hughes afterwards declared that what was done *was* a formal dissolution. It was provided that the business on hand should "be *closed up* as rapidly as possible by the *members* of the firm, *as partners*," under the original terms of association, and in the firm name.

If the partnership was intended to be continued, it could have been so said in so many words. That other phrases were used indicates the meaning to have been that, *although* the partnership was dissolved, the members of it were to

conduct the old business to a close, *as if* still partners under the original articles, and in the firm-name, although there was to be no longer a firm.

Passing, for the present, all question in regard to the contract claimed to have been created by the letter of Mr. Hughes, of 13th August, 1869, and the endorsements of Messrs. Denver and Peck on it, we inquire, first, what were, under the circumstances of the case, his rights without it, and the rights of his representative after his death.

It is urged upon the court that no inquiry will be entertained in regard to the inequality of value of services to a firm.

There is no inquiry here in regard to such inequality of services *while the partnership was in existence.* The inquiry is exclusively as to such inequality after the dissolution, and where the ex-partners were simply three lawyers, having in joint charge the business that remained undone.

The principle that is imagined to control in this case has never been better stated than by Domat: "It is not necessary for the equality of shares of the partners in the profit arising from the partnership that all their contributions should be equal; that every one should furnish as much money, as much industry, as much credit as every one of the other partners; but according as they contribute differently, one more money, another more industry, a third more credit, their condition may be equal by the equality of the advantages arising from these different contributions. And very often it is agreed, and with reason, that one of the partners shall contribute only his industry, and the other all the stock, and that nevertheless the profits shall be equal, because the industry of the one is worth the money of the other.

Domat: Les lois Civiles, part I, b. I, tit. 8, sec. 1, art. 7, No. 748.

In *Watney* vs. *Wells*, 2 *Chan. Appeals*, 252, the court held

that after a decree for dissolution, it was incorrect to say that the partnership *continues*, though the trade is carried on, and there are profits to be divided. *If this partnership was not dissolved on the* 13*th of March*, 1869, *it never could be dissolved until the last c entrusted to it had been closed up and no more business remained to be done.* For, after agreement or decree of dissolution, after formal, complete, express dissolution, it could not but be still a legal necessity that all the unfinished business of the firm should continue, until the end, to be faithfully and honestly attended to, and conducted and managed by all and every one of the partners precisely as if they were still in partnership, and with the same duties incumbent on each, and the same rights belonging to each as under the original partnership agreement. Whether the firm name continued or did not continue to be used in regard to it was unimportant. The articles of dissolution here continued the relation between the partners precisely as the law continued it, and imposed no duties, nor created any rights, not imposed or created by the law.

In the next place, the principle relied on, like all the others, is a principle of the law of *commercial* partnership. When there is no denial of a principle, but the argument is that it has no application to the case in hand, to quote it as if conclusive of the case amounts to very little. This principle applies in partnerships where there is a joint capital of money, values or property; and it cannot be applied, without qualification, to a partnership of workers, where it is *purely* the *earnings* of *labor* that are to be divided; and where, when one ceases to labor, he *withdraws* his capital; and, if he throws the principal burden of the work on his partners, acts in bad faith.

One partner or ex-partner could not, in such a labor-partnership, without the consent of the others, (which could not be presumed, because *præsumptio ex eo oritur quod plerumque fit*, and is proven in this case *not* to have been given,) take for his especial lot and share of the work and common

responsibility of the firm, a half-score of cases in this Court, in which there was no drudgery and little real labor, and throw upon his partners an hundred times the drudgery, labor and responsibility, in an hundred cases in the Court of Claims, and in many before the Departments of the Government, and the British and American Commission.

Iniquissimum genus societatis est, ex quâ quis damnum non etiam lucrum spectet.—Ulpian: L. 29, § 2, *ff. pro Socio. Dig.* XVII, 2.

It is one of the conditions of a partnership that each partner shall give to the business of the firm the benefit of his knowledge, time, labor, and attention, and that neither will neglect the business. This need not be expressed. In the absence of any stipulations excusing a partner, and relieving him in whole or in part, the law makes this a condition and term of the contract. The fact of partnership creates it.

In regard to this duty of partners, as to the business of the firm, we need hardly cite authorities. They only state what reason and justice and good faith enact as a supreme law. No man can be entitled to share in earnings who will not help to earn them.

Parsons on Partnerships, *223 to 230.
Parsons on Contracts, *166.

And if the partners make a subsequent agreement as to distribution of profits or earnings, this condition accompanies that also; and a party who does not comply with it cannot enforce the subsequent agreement.

In Const *vs.* Harris, 1 Turner & Russ., 525, the Lord Chancellor said: "In all partnerships, whether it is expressed in the deed or not, the partners are bound to be true and faithful to each other." This partnership was entitled to the whole time of each.

If Judge Hughes *had* obtained a contract securing to his

estate a certain share in all fees that might at any time in the future be collected, even years after his death, and for work wholly done after it, he was a thousand times more strongly bound, for that very reason, in law, equity, honor, conscience, common honesty, and common decency, not to neglect the business while he might live and be able to work. If he meant to neglect it when he obtained the contract, his obtaining it was a fraud that entitled the others to a rescission. To obtain it, and then, because he had obtained it, to abandon the business and office, was a fraud equally as great.

In Caldwell *vs.* Lieber, 7 Paige, 495, the chancellor said: "A case may be imagined of such gross dereliction of duty on the part of a partner as to justify the court in declaring the dissolution of the firm; and nothing short of such a case, in my judgment, will warrant a reference to a master to ascertain the value of the services of each, with a view to a decree that shall produce an equality between them."

There must be shown, he said, (497,) "a neglect so gross as to amount to a breach of good faith, and to be a fraud on the copartners."

In Const *vs.* Harris, 1 Turner & Russell, 523, the Lord Chancellor said: "It must be considered whether the plaintiff had not conceived himself at liberty to withhold more of his personal attention from the concern than he could withhold, entitling himself to call on the other partners to do their duty. * * * If he chose to discharge his duty in a more limited way, whether that would not destroy his right to call upon them to do their duty towards him. * * * Though there is a written agreement, nothing is more clear than that if there has been a long course of dealing, or one not long, but still *so* long as to demonstrate that they have all agreed to change the terms, they may be held to have changed them by conduct."

Such words as these of the Chancellor of New York and of the Lord Chancellor of England become law as soon as

they are uttered. They are steps in the onward progress of the law towards perfection. They depart from routine, and announce principles that command universal assent. It is idle to quote against them the general doctrines and broad propositions whose application it is their special purpose to limit, and which they do limit by a qualification overlooked at first, but announced when the case arose that required it, and forever thereafter modifying or excluding the action in such cases of a rule found to work injustice when applied without discrimination.

The Roman law had proclaimed the same principles as to negligence of a partner, for it in all cases followed the path in which reason led, and required good faith, not less but more in partnerships than elsewhere.

Venit in actione pro socio, says Pothier, *ut socius quicquid damni culpâ suâ societati dedit, cæteris pro parte cujusque resarciat,—Pandects*, XXIV, 70.

We think, however, that gross fault, the fault which the ancients assimilated to fraud, excessive negligence, can never be excused, even when it appears that the partner conducts with a like negligence in his private affairs. When he neglects *them*, he alone suffers the consequences: but when, by a voluntary and censurable negligence, he injures the affairs of the partnership, he ought to indemnify his partners for an injury that he has caused them.

Malepeyre & Jourdain: Des Sociétés Commerciales, No. 114.

The Roman law said: "*Si id quod quis in societatem contulit extinctum sit, videndum an pro socio agere possit? . . . Non putare se Celsus ait societatem manere.*

Ulpian, L. 53, *ff, pro socio.*

And, in the nature of things, and on first principles, there cannot be continuance of a partnership when one partner has withdrawn the whole of his capital. There can be no joint conduct of business when one of the partners has taken

out all he had in the business. A law-partnership is a working together, is joint labor and attention and counsel. If one withdraws all his counsel, labor and attention, he ends the partnership.

No longer existing *in fact*, it can no longer exist *in law*. There is no fiction of law that can prolong its existence. A partnership *is* a fact, and not a legal consequence of an agreement.

Socius socio etiam culpæ nomine tenetur, id est DESIDIÆ, *atque* NEGLIGENTIÆ. *Culpa autem non ad exactissimam diligentiam dirigenda est; sufficit enim talem diligentiam communibus rebus adhibere, qualem suis rebus adhibere solet; quia qui parum diligentem sibi socium adquirit, de se queri debet;* (a partner is also liable to a partner on the score of *fault;* that is, of IDLENESS and NEGLIGENCE. But by *fault* here we are not to understand the want of the most scrupulous diligence; for it is sufficient to apply such diligence to the partnership business as the partner is used to apply to his own affairs; because he who takes a somewhat negligent partner has himself to blame for it.)

GAIUS: *L.* 72, *ff, pro. Socio,* 17, 2, 2, *Dig.* 17, 2, 2.

Non ob eam rem minus ad periculum socii pertinet quod negligentiâ ejus periisset, quòd in plerisque aliis industriâ ejus societas aucta fuisset. Et hoc ex appellatione Imperator Antoninus pronuntiavit; (and for that which may have perished by the negligence of a partner, he is none the less responsible, because in many other things the partnership has made gain by his industry. And this, upon an appeal to him, the Emperor Antoninus decided.)—*Paul: L,* 25 *ff, pro socio.*

Et ideò si socius quædam negligenter in societate egisset, in plerisque autem societatem auxisset, non compensatur compendium cum negligentiâ; ut Marcellus libro sexto digestorum scripsit; (and therefore, if one partner has negligently managed some business in the partnership, but in many others has made gain for it, the gain is not compensated with the

negligence;) as MARCELLUS decided in *Book* 6, *Digestorum*.—ULPIAN: L. 26, *ff*, *pro socio*, *Dig.* 17, 2.

Utrùm ergo tantùm dolum, an etiam culpam præstare socium oporteat, quæritur? Et Celsus, libro septimo digestorum ita scripsit: Socios inter se dolum et culpam præstare oportet. Si in coëundâ societate, inquit, artem operamve pollicitus est alter, veluti cùm pecus in commune pascendum, aut agrum politori damus in commune quærendis fructibus; nimirùm ibi etiam culpa præstanda est; pretium enim operæ artis est velamentum. Quòd si rei communi socius nocuit, magis admittit culpam quoque venire: (Whether, therefore, a partner must answer for not only fraud but fault, the question is. And CELSUS, in Book 7, DIGESTORUM, wrote thus: Partners must answer to each other for fraud and fault. If, in forming a partnership, he says, one has promised skill or work, as when we furnish a flock to be pastured for joint profit, or a field to a cultivator for fruits to be acquired in common, there also fault is certainly to be answered for; for the value of the labor is the equivalent of skill. And if a partner injures the partnership, the better opinion is that he is answerable for fault.) *Ulpian*, *L.* 52, § 2, *ff. pro socio*. *Dig.* 17, 2.

It is quite true that we cannot be heard to complain of any inattention or neglect of Judge Hughes, prior to the dissolution of the partnership in March, 1869. Then he bound himself by a special contract to give his attention, as a partner and under the partnership articles, to closing up the business of the firm. He was bound to give *as much* attention as either of the others, for the obligations of all were the same. He had the right to take new business for himself; but he had not the right to withdraw from the office of the firm, never aft[illegible] to do anything there, and to throw the enormous labor of the firm almost wholly upon those who had been his partners. When he so withdrew from the office and business of the firm, he could certainly not pretend that the partnership continued to exist.

It is a familiar maxim that he who has cause of action

may avail himself of it by way of exception: *Cui damus actionem, eidem et exceptionem competere multò magis quis dixerit*, was no more a rule of the Roman law than it is of ours; and Hughes or his executor, claiming an equal share of the earnings subsequent to that agreement, are repellable by the exception of bad faith, which his neglect and inattention were.

Is it said to us, "Why did you not take steps to exclude from the partnership benefits, in his lifetime, and as soon as possible after his neglect began, the partner who virtually abandoned the business? why did you not wholly dissolve the partnership, have complete dissolution decreed, and the whole business immediately settled and closed up?" it will simply prove that the querist has not taken the trouble to reflect upon the subject.

What could a suit effect more than was provided for by the agreement of March, 1869? The business on hand must necessarily be conducted to a termination, and all the partners must give it their attention, whether continuing partners or not. The cases could not be divided out among them, for each owed it to the clients to attend to every case. The business could not be sold out; and if it were, or if the cases were divided, every partner would continue personally responsible to the clients for the conduct and management of the cases.

The partner guilty of neglect could neither be excluded from a case nor compelled to attend to it. *Nemo potest cogi præcisè ad factum.* The aggrieved partners were helpless, and the law as helpless as they. If Hughes neglected a case, they must attend to it or be responsible to the client. They were entirely at the mercy of the partner oblivious of his duty, and his *crassa negligentia* was not only fault but fraud.

But *is* the law *entirely* helpless? Were they entirely without remedy? Not quite. If *he* would not work, they could themselves attend to the whole business *or employ*

others to assist them in his place; and when fees were collected, they could refuse to permit him to exact part of what he had not helped to earn. If he sued for it they could recoup; or, in the language of the Roman law, *repel* him by the exception *doli.* Having a right of action against him for his neglect, they had also an exception for it, or else they had no remedy at all; and

Quæ sunt temporalia ad agendum, perpetua sunt ad excipiendum; according to which maxim one who has for defence the negligence, fault, or fraud of another may wait until he is sued, and his exception is never barred by length of time.

Man is a free agent. Mr. Hughes was sane. He had the right to abandon the business of the firm to his partners, if he chose to do so; but he had *not* the right to neglect it utterly and then claim part of the fees. Like the co-partner wagon-maker, he could leave the shop, take away his tools, and quit work if he saw fit; but when the wagon had been made by his abandoned partner he could not claim half the price of his manual labor. He quit the shop. The office of a law firm is its work-shop. He carried off his tools, for he sent his books to Indiana and applied his knowledge and talents and industry to other business with other partners.

The business of this firm consisted almost exclusively in the prosecution of claims against the United States. It was established for that. Those claims had to be prosecuted either

1st. In the Court of Claims;

2d. Before the Departments;

3d. Before Congress; or,

4th. Before a Commission created by law or treaty.

There could be no case in the Supreme Court on a claim against the United States, unless the claim had first been presented to, prosecuted in, and passed on by, the Court of Claims or a Circuit Court of the United States. Of other cases there never were more than two or three.

Of course the firm had for a long time no cases in the Supreme Court on appeal from the Court of Claims, and in all only ten or twelve that proceeded to argument or hearing.

The heaviest part of the business and ninety-nine hundreds of the labor was in the Court of Claims and before the British and American Commission.

It was never AGREED between the parties that each or any partner should attend to any particular portion of the business and not to the rest. Mr. Peck had come, before the dissolution, to be burdened with the whole business and labor in the Court of Claims, simply because it fell to him by degrees in consequence of non-attention to it by Mr. Hughes.

Naturally, his executor is loth to admit the whole extent of his abandonment of the business. He makes the utmost of what little he did do. He admits a little negligence; but the utmost he will say is, that he will *not* say that he did all that he might have done.

We have not questioned his ability and learning. We admit that he could have served the firm efficiently, if he had seen fit to do it. We do not desire to underrate his services in this Court. Even his idleness and negligence are not pleasant subjects to discuss. We neither asked a question nor said a word as to his habits. But we give little heed to the indignation of the executor at what he is pleased to regard as aspersions of his testator. He demands what Messrs. Denver and Peck do not think they owe; and they prove the facts on which their defense rests. The claim for a third or fourth of the fee in a case which Mr. Hughes withdrew from and denounced, compelled the defence. The arbitrators, who, it was hoped, would decide, *ex æquo et bono*, what sum in gross should be paid for the *value*, under all the circumstances, of Mr. Hughes' interest at the time of his death, differed as to the *legal* rights of his estate;

and, forced to discuss these, we are forced to comment on the proof.

There is no *real* discrepancy in the *material* testimony; and even by the testimony and admissions of the executor himself, a most meagre account of services by Mr. Hughes after the dissolution appears.

He had nothing *at all* to do with the business before the Departments, after the dissolution in March, 1869.

He had nothing to do *with a single case* before the British and American Commission (the records of which make eight large printed volumes,) and where there were single cases, in either of which Mr. Denver did more work than Mr. Hughes did in *all* the cases in the Supreme Court.

He did nothing whatever in the immense business in the Court of Claims. He took the papers in *one* case in 1872, and after keeping them awhile returned them without anything done. He abandoned the Lamar case to Peck and Denver. In the *only* other claim-case he touched, that of Warren Mitchell, he did somewhat, and then had Mr. Roane to prepare the brief. In the Hot Springs case he rendered some service, of no great value;—that is all.

Before Congress, he gave attention to the endeavors to procure the passage of a law to refund the cotton tax, which failed of success.

In effect, it is not pretended that he gave any serious and continued attention to *any* of the business of the firm, except to the cases in this Court.

Now, these cases, after the dissolution, were the following:

1. *Riddlesberger v. Hartford Ins. Co:* Submitted on brief prepared by a gentleman in Missouri, (about one paragraph added by Mr. Hughes,) and lost.

2. *United States v. Speed:* Case from Court of Claims, and argued by Mr. Peck.

That is the record of the work of Mr. Hughes, at the December term, 1868.

At December term, 1869:

3. *Drehman v. Stifle:* A private case, argued by Mr. Moody, of St. Louis.

4. *The United States v. Ayres.* New trial granted by Court of Claims, and appeal dismissed. Not heard in this Court.

5. *United States v. Theodore Adams.* Disposed of on motion. This was attended to by Mr. Hughes, with two or three other attorneys who argued it. It was lost.

6. *Texas v. White and Chiles.* Mr. Hughes was in the State Senate of Indiana when this case was heard, and it was argued for him voluntarily by another counsel.

December Term, 1870.

7. *Braun v. Sauerwein.* Mr. Hughes was of counsel with Messrs. Brent and Crittenden. Lost by Statute of Limitations.

8. *The Cotton-Tax Case.* In which Mr. Hughes filed a brief.

9. *Mc Veigh v. The United States.* There were three other counsel in this case. It came up from Richmond, whither Gen. Denver went to attend to it; and Mr. Hughes did not argue it here.

December Term, 1871.

10. *Silvy v. The United States*, and *Crussell v. The United States.* Argued together by Mr. Hughes.

11. *United States v. Burns.* Argued by Mr. Carpenter, who was paid by the client.

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12. *Maddox vs. The United States.* Argued by Messrs. Curtis and Hughes.

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These three cases were argued by Mr. Hughes, and all were lost.

16. *Gaines and others v. Rector and Hale.* Suit in regard to the Hot Springs. Continued until case in Court of Claims should be decided. Mr. Hughes appeared in the case, and had a brief prepared.

That is all from March, 1869, to the end of the term of 1872–73. No one has attempted to set an estimate on the value of his labor and services in these cases, but it is in testimony that in some of them he had other counsel to argue the questions, in others he made inadequate preparation; and that the business in this Court, was, on the whole, not attended to as it should have been.

Be that as it may, to argue a case or two, or two or three, chiefly of little or no difficulty, at an annual term, is a ludicrously pitiful display of work as a partner, compared with the enormous labor that he did not scruple to cast upon the shoulders of his partners. It was almost to be, in a busy partnership, *Phantasia, non homo.*

The executor made no effort to show, by producing the briefs or otherwise, than any of the cases required, or that there was in them, any expenditure of great learning or ability. It is evident that most of them involved no questions of difficulty, or that required arduous labor. It is in proof that he prepared the briefs, in some, a day or two before the hearing; and every one knows that either a case is of no difficulty, or it cannot be *properly* attended to in that way.

It is trne, that upon the theory of the executor and of the court below, it was not necessary to show the extent and value of the services in the Supreme Court here. If the proof had been positive and uncontradicted that from the moment of the dissolution, in March, 1869, Mr. Hughes had never once been in the office of the firm, and had never bestowed a thought upon its business, or done a moment's

work for the firm, in court or out of court; if it had been proven that he formally and explicitly withdrew in open court from every case of the firm in every court, and utterly abandoned all, and in open court denounced every one as fraudulent; if it had been proven that he went to Europe the day after the dissolution and remained there until his death, an utter stranger to the whole business of the firm, *the decree would, upon the same view of the law by the court below, have been just what it is.* This inexorable necessity "the law of partnership," as propounded to and accepted by the court, imposed upon the court.

The case of *Texas vs. White and Chiles* was a very grave one, but he was absent in Indiana, a member of the Legislature of that State; and it was argued for him without charge. *The Burns case* Mr. Carpenter argued. In *the Austell and Silvey cases* and the Sweeney case, Mr. Peck's briefs were filed. The *Maddox case* went off without argument, under the ruling in a former case. What did he do in *the Allen* and *Street case?* He had not attended to any of these in the Court of Claims, and in all he had the benefit of Mr. Peck's briefs filed there.

This is his record of service rendered. Is it possible that his neglect of all the other business caused no injury, to be set off against the slender value of these small services? Then, in *the Laplante case* he did nothing, and received his full share of the fee. What did he do for the money he received from Duncan, Sherman & Co.?

In the months of June, July, August, and September, 1872, he received, of the earnings of the firm, very little of which *he* had helped to earn, the sum of $23,666.94.

Mr. Roane thinks that for what he and Mr. Middleton did, Judge Hughes is entitled to credit, as they did it for him. Not so. The other partners were entitled to *his* services. Perhaps Mr. Roane prepared as good a brief as he would have done; but it was not the learning and ability of Mr. Roane to which the others were entitled, any more than

it was the brief or argument of another to which they were entitled in the Texas case.

But this is not all that is to be said in regard to the abandonment of the business by Mr. Hughes. It may be said that it all shows only negligence and inattention, and shifting of labor upon others not complained of.

But in February, 1872, Mr. Peck, upon whom, by degrees, in consequence of Mr. Hughes' disinclination to do anything anywhere except in the Supreme Court, *all* the labor in the Court of Claims, in which were pending near a hundred cases, had fallen, was prostrated by a sudden and dangerous attack, caused by overtaxing his mental and physical energies, was prohibited from even speaking about business, and in March went to Europe to recover his health.

Meanwhile, the Court of Claims was sitting. It was in the middle of the session, the first at which any of the cases of the firm could be tried, and a great number of cases stood for trial. In part of them Mr. Peck had prepared briefs. All the others—and what remained to be done in these must necessarily be, without delay, attended to—all fell upon Mr. Denver, who, it is claimed, "though a very estimable gentleman, was not known as a lawyer."

The work was too much for him. He worked night and day. He invoked the aid of the intellect, energy, and learning, so superior to his own, as the bill alleges, of the ex-Judge of the Court of Claims. He urged, begged, entreated him, again and again, to come to his assistance. This gentleman, whom it is considered ungenerous to term an idler, always promised to do so, *but never did.* At last, he agreed *to take* TWO *cases.* He took one, kept it two weeks, and returned it "without the scratch of a pen." He never attended to a single one of all the cases. He never went near the Court and Mr. Denver until Mr. Peck returned, and they together, afterwards, had to attend to all.

And during the months of June to September, in this

same year, Mr. Hughes received $23,666 of the earnings of the firm, being at the time indebted to it some seven or eight thousand dollars, and to Mr. Denver one-third of a note of the firm for $7,000.

Is there any dispute as to these facts? None. In respect to these cases in the Court of Claims, the executor explicitly admits that Mr. Hughes gave no attention to any of them. But, he alleges, Mr. Peck told him, before he went to Europe, (which he did on the 12th of March, 1872, returning on the 1st of July, 1872,) that *he* had prepared briefs in all the cases *likely to be reached;* that the points of law had been settled, and it was only necessary to submit the cases on his briefs. But, as he testifies, quite a number of cases were tried after his sickness, before his return, which was after the term had ended.

And, at the same time, Mr. Roane only knows that Mr. Denver "did give some attention" to the cases; he saw him at work on the cases; he prepared "some briefs;" does not *know* that he did, but has always *thought* he did. He kept the books, and knew what the printers' bills for briefs were, and the suggestion of this caused him to "have no doubt" that Mr. Denver "prepared briefs in some of them." As to himself, *he* supposed that *he* "prepared *fifteen* or *twenty* briefs;" and, answering the very next question, says, "I prepared some *twenty* or *thirty* myself."

Now, Mr. Roane was then, and had been for nearly two years, a partner of Mr. Hughes, doing nothing for the firm after May, 1870, except to keep the books. He *knew* and admits that Mr. Hughes gave no attention to the cases during Mr. Peck's sickness and absence. He knew that Mr. Peck, being sick, and afterwards absent nearly five months, did not. He knew that they *were* attended to, and many gained, and large results obtained by *somebody*. Is it credible that he knew no more of what Mr. Denver did than he has reluctantly said?

As to the cases in which *he* prepared briefs, they were of

a class in which Duncan, Sherman & Co. had employed the firm; there were some ninety of them, and most of them were routine cases, in which preparation of briefs required but little ability, or anything but care.

Testimony of Peck: Record, 90, 91.

The executor and his counsel certainly have some singular notions in regard to the duties of a partner. Judge Hughes, they say, was an able, learned, eminent lawyer, who had been a judge of the Court of Claims, as well as a member of Congress. Mr. Denver was a very estimable gentleman, but no lawyer; and Mr. Peck was a young man without experience.

Now, supposing this to be all true: does it not prove Mr. Hughes wholly naked of excuse, for leaving nearly the whole business of the firm to men so incompetent? If he was so far their superior, so much better qualified than they, was it not a fraud upon his clients (especially if *he* attracted them all,) for him to give the firm almost no benefit of his superior intellect and learning? He owed *all* of both to the service of his firm, to the service of his clients.

He, immediately after the dissolution, takes a new office and associates himself with another partner. *He* had ample time and leisure for the management of new business. It is quite evident that the partners whom he deserted had not. Their load was as heavy an one as they could bear. *He* could even commit the making of briefs to the clerk of the firm. *He* could be a member of the Indiana Legislature, a gentleman of leisure. Had he not two bondmen working for him?

If he was so infinitely the superior, what are we to say of his shameless dereliction of duty to his partners and to his clients, by the conduct which he indulged in when *the young and inexperienced member*, on whom he had thrown, by degrees, all the labor and responsibility in the Court of Claims, was prostrated in consequence, and *the estimable gen-*

tleman who was no lawyer begged the senior partner, rich in the capacity to serve their clients, to help him, even a little, with the cases; and he would give *no* assistance? Would not 'deportment' have been of as much value, both to partners and clients, as seniority, superior knowledge, larger experience, more signal ability, not employed in but persistently withheld from the service of the firm? Even in the Supreme Court he withheld them, and employed other counsel to do what it was *his* duty to do there.

The Court below decided on the authority of *Robinson* v. *Anderson*, 20 *Beavan*, 102, and *Webster* v. *Bray*, 7 *Hare*, 159. Both were cases between solicitors. So far, they resembled this. In every other respect they widely differed from it.

In the former, two solicitors were employed, one first and the other afterwards, to attend to the same case. Anderson insisted that there was no *joint* retainer, but that he was *separately* (being subsequently) employed; and that there was no agreement as to sharing of profits, but each was to be paid for what he should do. The Court said that it was for him to prove this; and he failed to do it.

Sir John Romilly said: "It is, in fact, a limited partnership for a particular sort of business. Assuming nothing to have been said as to the manner in which the profits were to be divided, it appears to me to follow, as a necessary consequence of law, that they are to be equally divided between them; and although one may do more business, and have exerted himself more than the other, yet, if nothing is said upon the subject of profits, the presumption is that they are to be equally divided between them. It appears to me that if the clients had gone to Mr. Robinson and Mr. Anderson and said, 'We wish you to undertake the business for us,' and thereupon Mr. R. and Mr. A. had both said, 'We agree to do so,' and nothing had taken place between them as to the manner in which they were to be paid, the necessary consequence would have been that, after payment

of the costs out of pocket, the net profits made by the business would have been divisible equally between them; and that neither of them could say to the other, 'I have done more business than you have, and am therefore entitled to a larger share of the profits.' It was the duty of the party who intended that this should not be a partnership transaction, and that he should be paid for the amount of business he did without participating in that of the other, so to express himself."

Undoubtedly the law is as stated by the learned judge. Nobody disputes it. If the solicitors were proven or presumed to be partners, the law presumed that they were *equal* partners, and nobody pretends that because one did less work than the other, his share of the earnings would be less. No two partners, probably, ever do exactly equal amounts of work, or work that yields exactly equal results. There must be *more* than mere inequality of work to prevent the application of the general rule.

So that this case merely says "partners are presumed to be equal partners, unless the contrary is shown." And that has always been the law. ULPIAN said (*L.* 29, *princip. ff.*, *pro socio*;) *si non fuerint partes societati adjectæ æquas eas esse constat.*

In *Webster vs. Bray*, two solicitors were employed by different boards of railway directors to attend to certain railway matters. The principal question was whether they had a *joint* interest, and it has held that they had; and so holding, Vice Chancellor WIGRAM said, "The conclusion to which the evidence would probably have led me is that to which I should perhaps have come, as a conclusion of law, without the evidence, namely, that in the absence of previous arrangement between the parties the remuneration to be paid to either for personal labor exceeding that contributed by the other must be left to the honor of the other; that where that principle was wanting a court of justice

could not supply it, and that equality in the division of the profits would be the rule.

"*No conclusion, however, could, morally speaking, be more unjust than that which would give the plaintiff a moiety of the profits* in this case, without allowing the defendant a percentage upon the work done by him exclusively. The case upon the bill throughout is that inequality of labor was contemplated from the beginning, and that it was understood between the plaintiff and defendant, that for this inequality the defendant should be compensated by a percentage upon the work he did."

All that this case decides for the executor here is, again, that the court will not inquire as to the inequality of labor or service in the case of partners. That is perfectly true. There is authority enough for that, but it is not needed, for nobody denies it; we should not come into *this* court with such a proposition as the contrary of that would be.

But what we *do* say is that when a partner grossly and persistently *refuses* to do more than an insignificant portion of the work, habitually neglects it, withdraws from and abandons the common office, throws all the burden of the partnership on his partners and becomes almost useless to the firm for years, he acts in bad faith, wrongs his partners, inflicts upon them *damnum* NON *absque injuriâ*, and forfeits his right to an equal share of the earnings. We admit the general principle. We present a case to which it does not apply. We claim the benefit of an exception to the general principle, and the reply to us is *merely the repetition of the general principle.* If one were by plea to confess and avoid, to reiterate by replication what the plea confesses, would amount to very little; but to quite as much as to repeat, in reply to us, that the court will not inquire as to inequality of service.

Wilson vs. *Johnstone*, 16 Equity Cases, 606, may enlighten the learned counsel as to the true ground of our defence. There a young man formed a partnership with an old, ex-

of the costs out of pocket, the net profits made by the business would have been divisible equally between them; and that neither of them could say to the other, 'I have done more business than you have, and am therefore entitled to a larger share of the profits.' It was the duty of the party who intended that this should not be a partnership transaction, and that he should be paid for the amount of business he did without participating in that of the other, so to express himself."

Undoubtedly the law is as stated by the learned judge. Nobody disputes it. If the solicitors were proven or presumed to be partners, the law presumed that they were *equal* partners, and nobody pretends that because one did less work than the other, his share of the earnings would be less. No two partners, probably, ever do exactly equal amounts of work, or work that yields exactly equal results. There must be *more* than mere inequality of work to prevent the application of the general rule.

So that this case merely says "partners are presumed to be equal partners, unless the contrary is shown." And that has always been the law. ULPIAN said (*L.* 29, *princip. ff.*, *pro socio*;) *si non fuerint partes societati adjectæ æquas eas esse constat.*

In *Webster vs. Bray*, two solicitors were employed by different boards of railway directors to attend to certain railway matters. The principal question was whether they had a *joint* interest, and it has held that they had; and so holding, Vice Chancellor WIGRAM said, "The conclusion to which the evidence would probably have led me is that to which I should perhaps have come, as a conclusion of law, without the evidence, namely, that in the absence of previous arrangement between the parties the remuneration to be paid to either for personal labor exceeding that contributed by the other must be left to the honor of the other; that where that principle was wanting a court of justice

could not supply it, and that equality in the division of the profits would be the rule.

"*No conclusion, however, could, morally speaking, be more unjust than that which would give the plaintiff a moiety of the profits* in this case, without allowing the defendant a percentage upon the work done by him exclusively. The case upon the bill throughout is that inequality of labor was contemplated from the beginning, and that it was understood between the plaintiff and defendant, that for this inequality the defendant should be compensated by a percentage upon the work he did."

All that this case decides for the executor here is, again, that the court will not inquire as to the inequality of labor or service in the case of partners. That is perfectly true. There is authority enough for that, but it is not needed, for nobody denies it; we should not come into *this* court with such a proposition as the contrary of that would be.

But what we *do* say is that when a partner grossly and persistently *refuses* to do more than an insignificant portion of the work, habitually neglects it, withdraws from and abandons the common office, throws all the burden of the partnership on his partners and becomes almost useless to the firm for years, he acts in bad faith, wrongs his partners, inflicts upon them *damnum* NON *absque injuriâ*, and forfeits his right to an equal share of the earnings. We admit the general principle. We present a case to which it does not apply. We claim the benefit of an exception to the general principle, and the reply to us is *merely the repetition of the general principle.* If one were by plea to confess and avoid, to reiterate by replication what the plea confesses, would amount to very little; but to quite as much as to repeat, in reply to us, that the court will not inquire as to inequality of service.

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perienced wine merchant, and paid pretty heavily, in the purchase of an equal interest. Not being allowed to draw what, by the contract, he had a right to draw regularly, he resorted to some not very proper expedients to procure money.

Sir John Wickens, V. C., said: "Another case, *which is much more difficult to deal with*, is such a repudiation as amounts to *throwing up rights as a partner, by conduct* OR NEGLECT. I consider that absenting himself from the partnership, and refusing to act as a partner, or to perform the functions of a partner, or to be a partner *in fact*, may be considered, and not unfairly, *as repudiating the partnership.*

"It seems to me that in principle, the only case in which the return of premium ought to be refused is either where there has been an actual *or implied release of the right to be a partner*, INCLUDING, UNDER THE LATTER HEAD, SUCH A DELIBERATE AND SERIOUS BREACH OF THE PARTNERSHIP CONTRACT AS MIGHT BE CONSIDERED EQUIVALENT TO A REPUDIATION OF IT ALTOGETHER. Mere conduct entitling the other partner to a decree for dissolution would not, I think, on principle, be sufficient; although without such conduct the right would not arise. The mere overdrawing, for instance, would not be enough, nor mere carelessness in keeping accounts, nor mere breach of a contract not to give credit, or the like, unless so deliberate, so continued, and so persisted in, after warning, *as to amount to a determination to treat the partnership articles as a nullity.* He who acts so as to show *that he treats the articles as a nullity, as regards his own obligations*, CANNOT COMPLAIN IF THEY ARE SO TREATED FOR ALL PURPOSES."

Where a party engages the services of a particular lawyer, or of an association of lawyers, he is entitled to the services of every one of them, and if one abandons the retainer, with the assent of the others, express or implied, or they attempt to supply his place with another attorney, of equal or superior qualifications, it will be no performance

of the contract. It is a personal duty or trust, which cannot be delegated to or performed by another.

Morgan *vs.* Roberts, 38 Illin., 65.

Upon the death of Mr. Hughes, one client of the firm, Warren Mitchell, who had always considered him as his especial counsel, exercising an unquestionable right, declined to accept the services of the survivors of the firm; every other client could have done the same; and if it thus loses one case and all the labor performed on it by his death, how is it possible that they can be bound to conduct *any* case after his death, and give to his estate a third or a fourth of their subsequent earnings therein? They can charge the client only for *their own* services from that date. How can they be bound to give to his estate what they cannot receive for it?

When attorneys who are employed under a special contract to prosecute a suit abandon the cause before its termination, they are thereby deprived of any claim under the contract, and must be left to recover such fees and compensation as they are reasonably entitled to on the basis of a quantum meruit.

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In that case there was a contract with four attorneys, three of whom composed a firm. One of the firm "consented to terminate the contract," and the Court said, "there is a strong presumption from the record that *all* the attorneys acquiesced in the abandonment of the case, as not one of them moved in it afterwards.

"The withdrawal of Mr. Blackwell from the case by consent of his associates would conclude the rights of the associates under the contract. When a party engages the services of a particular lawyer, or of an association of lawyers, he is entitled to the services of every one of them, and if one abandons the retainer with the consent of the others,

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express or implied, or they attempt to supply his place with another attorney of equal or superior qualifications, it will be no performance of the contract. It is a personal duty or trust which cannot be delegated to or performed by another. *Id.*

Now, when cases and claims have come into the hands of a firm of claim agents, and before much has been done in most of them, or anything in some, and none are finally settled and collected, and all the fees are contingent upon success, what is the law as to the interest of the deceased partner's estate in the contingent fees that are still, in whole or in part, to be earned? Does the mere fact that the cases had been entrusted to the firm before his death give him a complete right to an equal share of the fees, die as soon as he may, and however long a time may elapse after his death before they are earned and collected?

If, although nothing has been done in a given case, or in a large number of cases, or if very little has been done and vastly more remains to be done, the partner or partners who survive must do all the work and have all the responsibility and furnish all the knowledge, ability, eloquence, and attention, and yet the estate of the deceased shall have an equal share of the fees, it is clear that the law will have some pretty serious consequences.

Suppose there is a firm of three lawyers. If, when it has received but one case, where a contingent fee might be so large an interest as, in case of success, to amount to one or two hundred thousand dollars, two of the firm die, leaving the third to institute and prosecute the suit, and to labor for years, all the time at large expense, must he, upon final success, pay to the estate of each one-third of the fee?

This is not at all an unusual case. Large claims have been prosecuted at Washington by single persons during twenty years; and in some, a dozen persons have been at different times associated, some dying and their places being supplied by others.

We have found little in the books in regard to the settlement of accounts *inter sese* of law partners, when the death of one has dissolved the firm; and less in regard to the i-u terest of his estate in the unfinished business.

By the death of one partner, the partnership is dissolved, although created by the consent of all, and several partners remain; and unless in forming the partnership it was otherwise agreed; neither does the heir of a partner succeed him as partner. *Sed quod ex re communi postea quæsitum est* (but the heir has a right to claim by suit what afterwards proceeds from thecommon property.) PAUL: *L.* 65, § 9, *ff, pro socio: Dig.* xvii, 2.

There is a radical and essential difference between commercial partnerships and the partnerships of lawyers, doctors, scriveners or other professional persons. In the former, the firm has a capital of cash, goods or other property, which remains after the death of one partner, and entitles his estate to a share of the profits, if the business continues to be carried on, with the same capital, by the survivors. But in partnerships of the latter kind there is no cash or property-capital; and on the death of a partner, what he embarked, invested and engaged in the business is wholly withdrawn. Nothing survives him. His heir or representative cannot take his place. Neither may be competent to do it; and if they are, as one cannot delegate what is committed to him in *personal* trust and confidence, so no one can take the place of a deceased lawyer, in a firm of lawyers, or with his clients, by succession or representation.

In *McGill's creditors v. McGill's administrators*, 2 *Metcalf*, (*Ky.*,) 260, whi[illegible]vas a suit against the administrators of a member of a firm of lawyers, the court said that a contract with lawyers was a *personal* one. If a firm of lawyers are employed, the client, it said, has a right to the services of *all* its members, (citing 19 *Ves.*, 273.) If one dies, it said, the engagement is at an end, unless by its terms it is still to subsist, and the business to be attended to by the

survivors. For the services rendered during the continuance of the engagement, the firm is entitled to compensation; but by the death of one of the persons employed, the engagement is determined, if its completion requires any exercise of professional skill.

Consequently, 1st, no member of the firm can refuse or neglect to attend at all to the business or any particular case. If he does, the client, entitled to his services, owes him nothing for what he does not do. 2d. The firm has no right to excuse him from giving proper attention. If the client employs three, and one alone gives attention to his business, he is not bound to pay for the services of three. Of course, all need not attend to a particular case, where one can do it well and properly; but no one of the firm can utterly abandon the case, and refuse to give it attention, as Judge Hughes refused, when Mr. Peck fell sick, to attend at all to any case in the Court of Claims; or never *did* do it, though often requested. 3d. If the engagement of a firm ends, by the death of one of two or more law partners, it follows that when one dies, where the completion of the business requires professional skill, then, even when no new contract is made with the survivors, expressly, they continue to attend to it for themselves alone, under a new *tacit* agreement; for, as only *their* services are rendered thenceforward, they are paid for them only. It would be a fraud on the client to charge him for services of a deceased partner. 4th. If the engagement of the firm by the client ends, necessarily the interest of the deceased in the engagement ends.

Upon a thorough examination of all the English Equity Reports, to the last published, and all the reports of the Courts of Scotland, we find only what here follows, in regard to the settlement of the affairs of partnerships other than commercial, where one partner has died.

In *Earl of Cholmondely* v. *Lord Clinton*, 19 *Vesey*, 273, these points were ruled.

Solicitors in partnership cannot dissolve their partnership as against a client, who, having employed them both, insists on the benefit of their united exertions.

They cannot, without the consent of their client, who confided to their joint skill, dissolve, and turn him over to one of them.

"I am aware," Lord Eldon said, "that a practice prevails among partners of dividing their business; and, as between themselves, they might make that agreement; but they cannot be heard to say so in a court of justice."

Smith v. *Mules*, 9 *Hare*, 556, was a case of partnership between attorneys and solicitors. Part of the business consisted of stewardships and offices, such as clerkships of turnpike trusts, to be carried on jointly by the partners.

The decree in the case, after the death of a partner, was for the master *to fix the value* of the offices, after making reasonable allowance for conducting the business of the same while the employment lasted; and that the defendant should be charged with such value.

The case of *Watney* v. *Wells*, *Law Reports*, 2 *Chancery App.*, 252, settled some principles that have a direct bearing on this case. It was held:

That a decree for dissolution puts an end to the joint trade between the partners.

From that date it is incorrect to say that the partnership continues, though the trade is, in a certain sense, still carried on.

That upon a dissolution, each partner is entitled to a return of his capital, and equal division of the surplus.

That there are no "profits of the joint trade" after the dissolution; but if the trade is still carried on, each partner has his *respective* capital in it.

In *Willett* v. *Blanford*, 1 *Hare*, 260, the Vice Chancellor considered the question whether the settlement of the accounts and affairs of a partnership, dissolved by death of a

partner, ought to be made according to the proportions of their shares in his lifetime. He said:

"*There is no rule of this Court, applicable alike to all cases*—no rule so established or general in its application that it is taken as the general rule, until circumstances are shown which displace it. The facts of each case must be fully brought under the view of the Court, *before it can be in a position* to state what justice to the party seeking its protection may require, with due regard to the interests of other parties." (269.)

He said that he did not know the value of the stock in trade—

Or the amount of capital or current profits, at the time of the deceased partner's death—

Or how far the good-will constituted its value—

Or to what extent the successful prosecution of each business was dependant on the personal skill or attention of either partner, or on new capital brought in since the death.

In this case there was no stock in trade, in a commercial sense.

There was no *capital*, in the sense in which the Vice Chancellor used the word, nor any current *profits*.

There was no *good-will*. After the dissolution the *firm* was to receive no new business.

The *successful prosecution of the business was wholly dependent* on the skill and attention of the two surviving partners. In effect, the whole *business* was the use and employment of their skill and attention, their ability and energy. The *capital* was furnished *de die in diem*, and in that sense the *whole* capital, after the death of Hughes, was *new*; he left no capital in the firm; he even *owed* it largely, but that had nothing to do with the capital, which in no appreciable degree consisted of money or property. The furniture of the office was all, and that cannot enter into consideration. *De minimis non curat Prætor*.

The Vice Chancellor further said, (271 :)

"In business where the profit is made *by the personal activity and attention* with which the use of the money capital is directed, the case may require a very different determination. So if one furnished capital, and the other skill, and the latter died before connexion or good will established, *his estate could not*, as of course, *be entitled to a moiety*, after a lapse of years."

Here, there was *no money capital.* The whole capital, when the partnership was dissolved, was the skill and attention of each. Therefore, *à fortiori*, and gteatly *à fortiori*, in this and every such case, it is *impossible* that it can be of course that upon a partner's death his estate will be entitled to a moiety, third or fourth, according to the number of the partners, of the earnings of *future* labor, care, skill, diligence, and attention.

This is precisely the doctrine that we endeavored to persuade the Court below to appreciate. It is the doctrine of reason and justice and simple common sense. It is another step taken in the right direction; another principle incorporated in the law even of commercial partnerships.

But the Court could see nothing but the law of commercial partnerships, which, applied without discrimination or qualification to labor partnerships, become, in some respects, mere vicious nonsense. We shall never have a great code of law, composed of the exact deductions of unerring logic, the conclusions of pure reason, the quintessence of a subtile wisdom, formed by such judicial decisions as that from which we have appealed. To adapt the existing jurisprudence as to commercial partnerships, to partnerships of lawyers, physicians, actors, laborers, and the thousand other workers with hands and brain of the present day, it must be by degrees re-written by the Courts; and the decision that we are citing does re-write a portion of it, as Papinian and Scævola, by the distinctions of reason and logic, modified and

made applicable to special hypotheses the general notions of earlier jurists.

Even Justinian did not suppose that Tribonian and his coadjutants had made the Roman law perfect. *Non desperamus*, he said in his letter to the Senate, (2d preface to the Pandects, § 18), *Quædam posteà emergi negotia, quæ adhuc legum laqueis non sunt innodata.*

Again, the Vice Chancellor said:

"If the deceased partner had abstracted or borrowed more than the amount of *his property in the concern*, it would be anything but justice to hold that his right to share profits continued as if his accounts with the partnership were adjusted, and he had given his time and attention to the business."

By "his property in the concern," the Vice Chancellor meant the capital which he had embarked in it. Mr. Hughes had abstracted nearly the whole of the *capital* which *he* had embarked in the firm, long before his death, immediately after he had contracted and bound himself, by the articles of dissolution, on the 18th of March, 1869, to close up the business of the firm as rapidly as possible, *as a partner*, *under the articles of partnership*, and in the firm name. For he thenceforward wholly withdrew all his capital invested as to *all* the business of the firm, except a few cases in the Supreme Court, and was, from that time forward, *a total stranger* to all the rest. His representative was greatly aggrieved because we spoke of him as the idler of the firm. It was a simple statement of the truth. When Mr. Peck, overworked by an immense business in the Court of Claims, succumbed, and the whole burden devolved on Mr. Denver, until Mr. Peck's recovery and return, what was Mr. Hughes doing, *as a partner*, but *idling?* Is it not idling to do no other work than so much as is required by the argument of five or six cases in four years in this Court?

He did not, after March, 1869, "give his time and atten-

tion to the business." He set up another office and formed another partnership, not made known to Messrs. Denver and Peck, with a clerk quartered on the firm; and from that time forward he was a stranger to the office of the firm. He would have been little less engaged in the business of the firm if he had died before Mr. Peck was prostrated by sickness.

Finally, in considering the question to how much the deceased partner was entitled, the Vice Chancellor said that the nature of the trade, the mode of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner at the time of his death, and the conduct of the parties after his death—all were material.

That is precisely what we claim to be the law for this case.

In *Ambler* vs. *Bolton*, *Law Rep.*, 14 *Eq. Cases*, 427, there was a partnership for carrying the mails. A Government contract, entered into in the name of one of the partners, and containing a proviso against alienation, was part of the assets.

Lord Romilly, Master of the Rolls, said that this contract formed part of the partnership assets. How was it to be dealt with? The proviso prevents the defendant from assigning it, and therefore it cannot be sold. A value must be put on it, the best way you can, and it was accordingly referred to chambers, to ascertain the value of the contract at the date of the decree.

That the survivors were to carry out the contract at their own expense, for the benefit of themselves and the deceased partner's estate, was not thought of. It was simply a contract *to do work*, to carry the mail; and, if carried on, (as indeed it had to be,) the survivors had to do all, and nobody imagined that they must, alone, earn money to share it with those who could not help earn it.

In *McClean* vs. *Kennard*, 9 *Chancery Appeals*, 336, five contractors obtained a concession and obtained a contract

to build a harbor at Alexandria, in Egypt, the building of which would take at least five years. Soon afterwards one died. The agreement was that the profits and losses should be shared equally, and there were no articles of partnership.

Sir James Bacon, Vice Chancellor, held that after Kennard's death his estate would not be in any degree liable for losses, if losses had subsequently occurred. The burthen of fulfilling the contract was on the survivors. All they did after Kennard's death was at their own risk. The relation between them and him was determined, and they were the sole contractors. They were not at liberty to withdraw from the contract. They could not sell the concession. They had to carry out the contract. "I know," he said, "of no principle of law by which it can be held that the representatives of a deceased partner, engaged in such a contract as here existed, can claim to be admitted to the partnership, and to fill the place of the deceased. The utmost legal right of the representatives is to be paid by the continuing partners the value of that share of the partnership assets which, up to the time of his death, he had enjoyed and possessed. The representatives are not bound to continue the partnership undertaking, could have no right to require the survivors to desist from fulfilling the partnership engagements, or to insist that if the contract were continued, it should be for their benefit, as if their testator had remained alive.

Sir W. M. James, L. J., on appeal, held that "*the testator being at the time of his death a contractor*, his estate became, in equity, *a co-contractor in the business.*" The result is, he said, that the executors are entitled to share in the profits of the contract, if there are profits, *and became liable to share losses*, if there were losses, and are entitled to have the claims and liabilities ascertained, in the only mode in which they can be ascertained, that is to say, by having the contract com-

pleted, and seeing, at the end of the contract, what is the result as to profit or loss.

"The deceased was a contractor; his estate became a co-contractor." Evidently the proposition was, in the mind of the judge, a consequence of the simpler proposition, that if a man has, alone, such a contract, his estate or executors can carry it out; and, *ergo*, if he and another have it, his estate and the other are co contractors.

But if a lawyer has fifty suits on his hands, his *estate* does not become counsel of his clients by succession, nor does his executor, nor do his heirs. A *personal* trust and confidence form no part of one's inheritance. The executor and survivor would not be joint counsel. The executor might be a blacksmith. If a lawyer, that is but an accidental quality, which would no more entitle *him* to succeed as counsel than his trade would entitle the blacksmith.

In the case cited, two of the executors had signed an agreement (which the plaintiffs were endeavoring to avoid, because the third, who had disclaimed, had not signed it,) by which they and the survivors agreed (they as sleeping partners, the survivors managing,) to carry out the contract on joint account, all contributing equally to the expenses. In case of another partner's death, *his* representatives to be sleeping partners, and the contract to be carried on for *their* benefit also.

Of course the whole case was decided when it was held that the estate became co-contractor, liable for losses, entitled to profits, and, of course, bound to contribute equally to expenses. That was a decision that the case was totally and radically different from that of a law partnership.

It is the same case, said Sir W. M. James, as the case of four persons engaged in a contract for the purchase of a cargo of cotton, and it not being wholly delivered at the time of the death of one of them. Surely, he said, the transaction would have to be completed, and the profit or loss be received or paid by the executors.

A contract by two undertakers to build a house, when they themselves were not to work at it, but to *have* it built, would have been a more apt illustration. But the reasoning of the learned judge seems hardly satisfactory. There ought to be mutuality in such a case; and we hardly think that the survivors could have *compelled* the executors or estate to be co-contractors with them, contributing to expenses, and running the risk of losses. What if the estate were insolvent? Could the executors, if it were not, commit the estate to such an enterprise without the consent of heirs, devisees, and creditors? If the estate became co-contractor, it became *necessarily* so; and the consequence of that was that the Pasha who made the concession and contract could have sued them for damages if they failed or refused to carry out the contract.

But whether the learned judge erred or did not err in this, he so held; and the same thing *cannot be* held in the case of a law partnership. Therefore, the conclusion that he reached cannot follow.

Sir G. Mellish, L. J., was of the same opinion. In equity, he said, the *benefit* of the contract, *and liability under the contract* continued, as between the executors and the survivors. There is no authority, he said, for the proposition that a court of equity would compel the executors to accept a *valuation* instead of taking the profit that may arise from carrying on the contract.

Of course not, if the executors succeeded by law to the contractorship—if the estate became co-contractor. *If* it did so, it did so with all the incidents and consequences of co-contractorship.

But it is permissible to doubt the succession of an estate or executor to a copartnership. *Nemo potest societatem hæredi suo sic parere, ut ipse hæres socius sit;* ULPIAN says, in L. 35, ff., pro socio; and Pomponius, in L. 40 of the same title, *Hæres socii, quamvis socius non est, tamen ea quæ per defunctum*

inchoata sunt, per hæredem explicari debent: in quibus dolus ejus admitti potest.

Adeò morte socii solvitur societas, ut nec ab initio pacisci possimus, ut hæres etiam succedat societati. Hæc ita in privatis societatibus ait; (the partnership is so completely dissolved by the death of a partner that in its formation we cannot agree that the heir of one dying shall succeed him as partner.) *Pomponius: L.* 59, *princip, ff. pro socio.*

This partnership was formed for the prosecution of claims before Congress, before the Departments, in the Court of Claims, and before any other tribunals that might be established for the adjudication of claims. In controversies between individuals, the regular business of counsellors and solicitors, it was hardly at all employed. It had one such case in this Court, that of Texas *vs.* White and Chiles, and hardly another anywhere.

It was, therefore, really an association of claim-agents, working exclusively for large contingent fees; and in most of the cases industry, attention, perseverance, and persistence were more needed than legal learning and volubility.

There was nothing in it that caused it to differ from any other association of persons for the purpose of earning money by united labor.

And there is no magic in the word "partnership," when an association or union of workers is meant by it, and there are *earnings* but not *profits*. A commercial partnership, a banking partnership, any partnership that trades, deals in merchandise, stocks, money, though not a corporation, is yet a quasi person, distinct from the partners. Neither has a right to any specific article of the property of the firm. Everything belongs to the firm; and the interest of any one partner is his share of what will remain, of property and profit, after the settlement of all affairs. *Neque enim lucrum intelligitur, nisi omni damno deducto; neque damnum, nisi omni lucro deducto. Paul: L.* 30, *ff., pro socio.*

An association of claim-agents is simply so many persons

who agree to prosecute claims jointly and divide the fees equally or unequally. It is no more a partnership when formed for fifty cases, or any that may be offered, than when formed for one by mere joint employment by the same client.

And the bill in this case cannot be maintained except upon the theory that when men so associate for *labor*, the earnings are to be divided as they are received, so that, as soon as a particular fee is collected, each has a legal right to his share of it, without reference to any final settlement. Earnings are for living upon. A law-firm does not invest them. One partner has the same right to them as each other; each a *complete* right to his equal share, if he is not in arrears to the others. If he is, they, receiving fees or earnings, are entitled to apply his share to paying themselves.

After the dissolution in this case there remained no partnership. Hughes was not a member of *two* firms at once. They were three lawyers jointly employed to attend to the unfinished cases; and if one of them refused to help *earn* the fees he was not entitled to share them. If he grossly neglected the business, and threw all or most of the labor and responsibility on the others, his interest in the earnings lessened accordingly.

There is nothing, we have said, to distinguish an association of three lawyers or claim-agents from an association of any other workers with hands or brain. That intellect and learning are part of the investment by each can make no difference as to the legal principles that are applicable. That it is more *honorable* (if it is so) than another society of workers does not change a single principle. Intelligence, skill, attention, labor, are the sole capital in all. The business of the firm is not to trade, not to own property, not to contract debts, and any partner can retire from it at any moment. If one refuses to work, he *does* withdraw from it. There needs no other dissolution.

Now, suppose ten lawyers formed a partnership, and nine

died just as the firm had had placed in its charge a large amount of heavy business, in and out of several courts, and requiring the close and constant attention of every one of the ten partners. Is anybody insane enough to contend that the single survivor must carry on all the business, five, ten, fifteen years, at his own costs, charges and expenses, for one-tenth of all the fees?

If two or three physicians form a partnership, and one dies, must the other continue to attend to a long and dangerous case of illness, for the equal benefit of the estate of the deceased partner, because it commenced, and the firm was employed by the sick man before that partner's death? Suppose, on the patient's recovery, the surviving partner were to charge him so much, by a separate item, for attendance, prescriptions, &c., by the deceased partner, or as earned for his estate after his death.

If two wagon-makers in partnership owned each his own tools, and purchased their materials as they needed them, and one were to die just after a wagon was ordered, would the survivor be bound to go on and purchase the materials, pay the rent of the workshop, use his own tools, and make the wagon, and then divide the proceeds of his labor and skill equally with the estate of the deceased partner?

If two school-teachers were partners as such, and one died just as a term commenced, or just after a scholar was engaged, would the other be compelled to carry on the school, or teach that scholar until his education was completed, and divide equally with the deceased partner's estate the moneys received for tuition?

Or, if two Chinamen had turned the stream of a California river, and were washing gold out from a sand and gravel bar, each with his own rocker, but to divide the fruits equally, and one were to die, the court below, if it sat there, would decree that the survivor should go on washing until the bar should be exhausted and the ditch useless while the executive of the dead Chinaman should stand by with his

hands in his pockets, and take half of his earnings every night, the survivor "finding and feeding" himself. Great are the glories of the law of partnership!

As we have said, the principles applicable to a firm of claim-agents would equally apply to an association of Irish mowers and reapers, formed in Ireland, to go to England, and take contracts for mowing and reaping, to be done by them jointly. They contract with a dozen different farmers. When they have jointly mowed or reaped two or three meadows or fields, one concludes that he is the senior member of the firm, who brought the others into it, and through whose acquaintance in England in prior years, and his known skill as a mower and reaper, most of the contracts were obtained. One of the others is an estimable gentleman, but not known to the world as an expert mower and reaper. The other is a young man, whom the *senior* associated with him, upon the suggestion and at the wish of the young man's father. So the senior takes for his share of the remaining work one little field, works in it an hour or so a day, and looks on while his partners toil and sweat in ten other fields and meadows, from dewy morn until the evening star shines, and then demands a third of their hard earned moneys. Would the law of partnership give it to him?

What if he dies after the contracts are made, before *any* work has been done, or when one or two fields, out of fifty, have been reaped. Is his estate entitled to claim a full third of all the earnings of the others under the contract?

If not, the court below, in this case, misapplied what is fancied to be the law of partnership.

A partnership of lawyers is precisely the same as a partnership of chimney-sweeps, each owning his own bag and scraper, each putting in his skill and labor, and all dividing the earnings equally. If they have a dozen chimneys engaged, and one of the partners dies, must the others go on to clean the chimneys and pay over an equal share of the earnings

to his estate? Suppose that, understanding that the courts would so decide, they should decline to clean them on those terms, and therefore go in search of other chimneys to sweep?

Undoubtedly the reputation of one member of a firm of lawyers may attract more business to the firm than that of another partner. If it does, so much the more is it bad faith in him not to attend to the business which is entrusted to the firm on account of his reputation for ability or learning.

And so, too, his mere personal popularity might attract more, or his qualities disreputable to a lawyer. So might the superior bodily strength of one of a firm of stevedores or haymakers or reapers, or the greater skill of a sweep. But nevertheless, if one dies, his estate is entitled only to his share of the earnings up to the time of his death; because no matter how the jobs were obtained, what is received by reason of them is all earnings, the fruit of *labor*, directed by skill and energy; and among workers no man can have a right to share what he does not help to earn.

The learned counsel for the executor fancied, before the arbitrators, that the *business* obtained by the firm was its *capital*. So then would the contracts obtained by the mowers or the sweeps be *their* capital. The learned counsel erred. What was the *business* of the firm? It was their *employment*, to attend to the cases entrusted to them. What there was of *value* to them, all that was *theirs*, was the fees which their employment gave them the opportunity to earn; and these fees were not *capital*, but the *earnings* of labor. The business, the employment, was an *engagement*, giving them opportunity to use their capital—of learning, ability and industry, of skill and attention. The right to do work and earn wages is not capital. It does not survive when a man dies.

If we look in succession at associations or partnership—

Of solicitors, counsellors or attorneys:
Of claim agents, patent agents or pensions agents:
Of joint writers of dramas, novels or other works:
Of physicians or dentists:
Of teachers:
Of insurance agents:
Of artizans and mechanics, selling only what they manufacture:
Of renters of cotton-lands, furnishing only their labor:
Of salvors, of builders of levees, and other laborers:
Of mowers and reapers, men contracting to clear lands of their timber trees, and others who take contracts by the job, and gold-hunters washing Californian sands:
Of sweeps and shoeblacks who divide their earnings equally;

where is the line of distinction to be drawn that shall put those on one side under the law of commercial partnerships, while it would be too ridiculous to apply that law to those on the other side?

In *Cooke vs. Collingridge*, *Jacob*, 602, Lord Eldon said, "I have never said that the persons by whose labor and trouble the business is carried on (after the death of a partner) were not to have a reasonable allowance for it." And in that case the Attorney General, *arguendo*, had said, "*The testator's capital was not retained;* the profits were chiefly owing to the skill and exertions of the defendants, and to their connexions, *to the benefits of which other persons can have no claim.*"

This remark of the Attorney General is a wise one, and has a wider application than he knew. In a partnership, professional or for labor, when one partner dies, his representatives *cannot* have any claim to the future earnings of the survivors, to the benefits of *their* skill and exertions.

When one of several law-partners dies, the survivors *must* have the right, if the business requires it, to associate with themselves, for the management of the business on hand, or to employ by special contract another *competent* person in his stead. Of the *necessity* for this, or the propriety of it, they *must* be the only competent judges. There are many cases where the death of one member of a firm would make it hazardous, unwise, *unjust* to the clients, for the survivors to continue to manage the business alone. The clients would have a right to require them to employ a person as capable as he, to take his place; and if they *would* not or *could* not do so, the clients would have perfect right to discharge them, and take their business elsewhere.

Whatever the survivors would have to pay out of a particular fee, to the person so associated with them or employed, they certainly could not be compelled to pay a second time, and also, to the representative of the deceased partner.

And they would have the right, and would probably find it necessary, in associating a new partner with themselves, to ascertain, by the best means and from the best data in their power, what proportion the service (of labor, use of the intellect, use of professional learning, etc.,) remaining to be rendered in each case and in the business generally, would bear to that which had been rendered at the day of the death of the deceased partner, and to fix the interest of the new partner accordingly. That is, if one had died and two survived, and it was estimated that in a particular case the work to be done and service to be rendered was to the work already done and service already rendered as two to three, then two-fifths of the fee would still remain to be earned; and the new partner would be entitled to one-third of that, or two-fifteenths of the whole fee; and the estate of the deceased to one-fifth of it, *impensis deductis*.

Impensis deductis, because, as the estate of the deceased partner is at no expense in the conduct and management of

the business, the proportion of all the expenses of the firm, subsequent to his death, which the particular fee may bear to all the earnings up to the time when the old business ends, must be deducted from it, before ascertaining what of it belongs to the estate of the deceased partner.

It is clear that the two survivors, or the single survivor of *three* partners, cannot be compelled to carry on and complete the business *alone*. Then it cannot be decreed that they shall pay over to the representative or representatives of the deceased partner or partners one-third or two-thirds of the whole fee collected *in futuro* in each case; for if it could, they could not employ any one to take the place of the deceased.

If, when one of three dies, his estate is entitled to receive one-third of the whole fee in a suit just commenced, whenever it may be determined, it is because the client will then owe that third to the firm for his estate. A second partner dies, and the client will then owe another third to the firm for *his* estate. Then if the third dies while the case is still hardly begun, will not the client, when it ends, owe another third to *his* estate? Thus he will owe the whole fee, and be compelled to employ other counsel, for additional, perhaps equal, compensation.

The estate of a deceased partner *can*, therefore, be entitled only to his equal share of what, when the case ends and the fee is paid, will be found to have been earned by them at the day of his death; of what portion of the whole the client, dividing the whole fee between the old and new firm then, would be found to owe the old one.

And, when it was ascertained how much had been earned and was owed at his death, the other partners *must* have the right, if his labor has been, by his fault, disproportionately less than theirs, if he has neglected the business and virtually abandoned it, and thrown the burden of it on them, to have his share diminished proportionately in their favor, even, in

an extreme and outrageous case, to denying him any interest at all.

All which would have to be ascertained, according to the Roman phrase, *arbitrio boni viri*, by an officer of the court or a competent jury.

And the mode of *settling* the partnership affairs by continuing it with a dead man as still a member of it is utterly erroneous.

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§ 2.

THE SUIT NOT MAINTAINABLE, AND THE DECREE ULTRA VIRES.

If the bill in this case was intended to be a bill for the settlement of the partnership affairs, it was prematurely brought, unless its intention was to close the affairs of the partnership at once. It could not be brought for such a purpose as it has been used for; that is, for the division of moneys in hand, and for future division of moneys to be received during an indefinite period of time.

The bill in this case is not a bill to *settle* and *close* the partnership. It is a bill to continue it indefinitely, until, by the extinction of all its business, it closes itself. It is a bill to make necessary, during an indefinite period of time, periodical statements and settlements of receipts, losses, earnings, and expenses. It is a bill, either to have the partnership affairs carried on under the immediate and constant supervision of the Court, retaining the case for the enforcement, from time to time, of the adjudications of the decree, or it is a bill to recover certain specific sums of money, and to have it decreed to be the complainant's right to bring such a suit from time to time, and as often as a fee may be collected by the survivors of the firm.

The decree in this case, for all practical purposes, so far as it is or can be a burden on the survivors, *continues* the partnership, and does not settle it. But *nulla societas in*

æternum coitio est: Nemo invitus compellitur ad communionem; and "It is an engagement which all persons are under who have anything in common among them, to come to partition when any one of them desires it. For they may, indeed, all of them have the joint enjoyment of the thing which belongs to them in common, if this undivided enjoyment thereof be agreeable to them, and suit with their conveniency; but if any one of them is desirous to have his portion to himself it would be contrary to justice and to sound morality to force him to have it always undivided, since that would be a perpetual occasion of strife and contention among them."

PAUL: *L.* 70, *ff. p.* 20, *pro socio.*
ULPIAN: *L.* 26, § 4, *ff., de condict. indeb. Dig.* xii, 6.
DOMAT: *Les lois civiles dans leur ordre naturel: Part* 2, *B.* 1. *Tit.* 4, *No.* 2740.

It is impossible to doubt that the change of friendship into enmity between Mr. Hughes and those who had been his partners and were still jointly engaged with him in conducting the affairs of other men, at and for many months before his death, made it impossible for those relations to be continued; or that, especially after he had preferred charges against one of them to disbar him and thereby incapacitate him to do his duty as counsel in the joint business, a court, upon a bill to settle the affairs of the firm, or for an account, could not have refused completely to end and annul those joint relations. For it would have been contrary to justice and to sound morality to compel the partners still to manage the business jointly, when they could no longer do so harmoniously, could have no intercourse with each other, and could not, therefore, take counsel together in their clients' interest, nor give them the benefit of their united counsels, nor coöperate in the management of their causes. To have decreed a continuance of the joint relations would have created a perpetual occasion of strife and contention

among the counsel, and, in this case, have been an intolerable oppression of those upon whom all the burdens of the business had been thrown.

By the decree it is established, if the decree be not in utter violation of law and equity, that it is the *duty* of the appellants, a duty which honesty and good faith compel them to perform, to go on with the business of the dissolved firm until it ends, and pay over punctually to the executor, who is to contribute nothing, and those for whom he receives it are to contribute nothing, towards *earning* the fees that they are to share, the full share of his testator. It gives to Messrs. Denver and Peck the executor of the will of Hughes for an overseer and taskmaster, the punctual collector of a reluctant tribute. They are to till and labor, and he and those whom he represents are to take their share when the harvest is gathered, without having labored or incurred expense, without having had to pay the cost of their own living out of their share of the earnings of the unfortunate survivors of a slothful and useless partner.

That this suit has been instituted; that there are direct issues of veracity between the parties; that imputations of dishonesty and dishonor have been recklessly uttered and printed, and that relations of amity or even of mutual respect have been rendered impossible between the executor and either of the surviving partners, makes it absolutely necessary to close and terminate all relations between them. The decree does not do that. It continues those relations to bring forth bitter fruits of constant provocation, irritation and anger, pestilent and impertinent interference and intermeddling, or, what will be regarded as such, continual demands for accounting, assertions of right to inspect the books, perpetual occasion for contention, ill-blood, and bitter enmity.

Such a decree is immoral, iniquitous, *contra bonos mores*, and lacks little of being criminal.

The choice of the persons is so essentially necessary to the constituting of a partnership that even the heirs or executors of the partners themselves do not succeed to this quality of partner; because it may happen that they are not fit for it; and likewise that they may either not relish the commerce that is carried on by the partnership, or not approve of the persons of the copartners. * * * The tie of partners can be no other than voluntary.

DOMAT: *Les lois Civiles: Part* 1, *B.* 1. *Tit.* 8, *Sec.* 2, *Art.* 3, *No.* 756.

Yet here is a partnership virtually created by decree, *against* the will and vigorous protest of two of the forced partners, and in which there is the most galling and unrighteous inequality, since one partner contributes *nothing*—neither money nor credit, industry, skill, time, or even his name, to the firm, and is to share he earnings of their labor, without cost or expense to himself, or the least liability for losses, or responsibility for anything.

Remedia toties invenit nobis curia
Periculis pejora.

As the client cannot be bound to pay anything for the services of one of the partners, after death has ended them, except for the time before his death; and as every client of the firm had the right to demand that a lawyer of equal ability should be employed in his stead, to entitle the survivors to claim the whole fee or compensation, how escape the conclusion that the estate of the deceased *can* be entitled only to so much of his expected part of the fee, and of all the earnings, as he had earned at the day of his death? The persons employed in his stead, if they *are* employed, will take the residue of his share; and if none are employed, his survivors will have no right to demand it.

The various clients may, at any time hereafter, demand that the survivors shall employ associates in the stead of Mr. Hughes, or give up the cases altogether. This may be

done in every case in which a fourth of the fee is prospectively decreed to the executor. Is not the demonstration complete, that the decree is incredibly erroneous? The clients, when the decree is made known to them, have a right to say, "*Qui è nuce nucleum esse vult, frangat nucem:* if any one wants our money, let him earn it. We will not pay any one money to be paid to an executor, for services that death has prevented his testator rendering;" neither are they under obligation to do it, nor ought they.

It is *possible* that not one of the claims still in the hands of the firm may ever be paid; while the survivors may continue to labor at them for years. Meanwhile, if the decree is executed, the survivors will have paid over the share decreed to the executor, of all moneys received, and must bear the loss of all their time and labor, and all that it has cost them to live while unsuccessfully endeavoring to collect the other claims. Would this be *equity* or iniquity?

Moreover, in a place like Washington, where professional blackmailers abound, and scores of men will claim an interest in the contingent fee, on the most frivolous pretexts, and there are often demands for interest in fees that are not anticipated until success is either achieved or near at hand, it cannot be known what losses, from these causes, considering the business as a whole, may have to be deducted from the earnings.

How is it possible, then, to maintain a suit in equity for the settlement of the affairs of this partnership, unless the decree is to determine the actual value of the interest of Mr. Hughes at his death, the percentage of his interest on the whole business, and adjudging him that value of his interest, less a reasonable allowance to the survivors for their labor, time and expenses of living, while conducting to a termination the business of the firm; or without taking into consideration, in ascertaining that value, how much Mr. Hughes had done, during the four years and seven months preceding his death, to assist in earning what his estate claims a right to share.

It is also impossible to maintain the decree on another ground. The suit is brought and the decree rendered for several distinct and specific sums of money, specific portions of one-third or one-fourth of certain particular and specific sums that have been received, and that may be hereafter received by and be in the hands of the survivors. These sums are wholly distinct and independent of each other; and as to each the bill claims and the decree declares a specific and distinct indebtedness, without any reference to a general settlement of all accounts and closing of all partnership relations. Equity has no jurisdiction of such actions. They are no more than several counts in a declaration in debt or assumpsit. It is precisely as if the bill were filed for one-third, by partition, of a particular thing capable of division, belonging to the partnership, of so much gold by weight, or of a flock, or of certain goods.

If there is in the testator a right to one-third or one-fourth of the fees in particular cases, the right is necessarily only to such a proportion of those gains or acquests, *after all losses deducted. Lucrum non intelligitur, nisi omni damno deducto*, Paul says, *Dig. xvii*, 2, 30: where, also, he says that Mucius held, as Servius did and he approved, *non posse societatem coiri, ut aliam damni aliam lucri partem socius ferat*, which is precisely the partnership between Denver and Peck on the one side and Archibald Roane on the other, that the supreme court of the District of Columbia has become author of, with the addition that while Roane shall share the earnings he shall contribute nothing to the principal losses and do nothing toward earning what he is to receive. *Sicuti lucrum, ita damnum quoque commune esse oportet quod non culpâ socii contingit.— Ulpian, L. 5, § 4, ff. pro socio*, (*Dig.* 17, 2, 5, § 4.)

Inasmuch, the court of appeals of Bordeaux said, in *Domecq* vs. *Domecq et al.*, 2 *Journ. du Pal. of* 1831, 504, "as the rules for the partition of successions are applicable to the partition of partnerships; as one of the partners

cannot compel the others to divide a particular thing of the partnership before the ascertainment of the net value of the partnership property, and before the liquidation of the partnership has been proceeded with, and the accounts of the partners settled. * * * Inasmuch as, in regard to the costs, Laroque, in the name in which he sues, can have no more rights than he whose rights of action he exercises, and cannot pretend ignorance of them; that, founding his demand for division upon the partnership that had existed, it was his business to inform himself whether this partnership had been liquidated, and the accounts of the partners settled and closed, (*reglés*,) and that, failing to take this precaution, he has brought an inadmissible suit, the costs whereof he must pay. * * * DECLARES, that there can be no adjudication, at present, as to the division of this land; without prejudice to the parties to cause the settlement of the accounts to be proceeded with, the liquidation and the partition of the partnership; with respect whereunto all their rights are reserved."

Almost always, at the moment of dissolution of a partnership, the capital of it is engaged in operations yet unfinished, and the result whereof cannot be exactly known. The *actif*, therefore, cannot be fixed until after the completion of the negotiations begun, the recovery of credits and the payment of debts; and, nevertheless, the exact determination of the *actif* is indispensable to enable partition to be proceeded to between the partners. Thence results the necessity of having recourse, after the dissolution, to operations having for their object to *liquidate;* that is, to determine, realize, and render disposable the *actif* of the partnership, *and make division between the partners possible.—Malepeyre & Jourdain: Traité des Sociétés Commerciales, Nos.* 442, 507.

After dissolution every partner is debtor, whether for his contribution to the capital, so far as he has not paid it in, or for sums belonging to the partnership which he has em-

ployed in his personal affairs. He owes interest, also, on these sums from the day when they were used for his profit, *and moreover, ample damages if he has caused unquestionable prejudice to the partnership.* He cannot refuse to pay to the liquidators the sums which he is so found to owe, under the pretext that he will credit them against his share of the assets of the partnership. In fact, he could ground his refusal only upon compensation to be operated with his share in the assets; but there can be compensation only between liquidated credits; and the rights of each partner in the mass to be divided are not liquidated until after the liquidation of the partnership. *Id., No.* 533.

The partners, on their side, have the right to reclaim all sums that they have advanced to the partnership, and interest upon them from the day when they were advanced, because they are then considered no longer as partners, but as third person's creditors of the partnership. The partnership can no more compel the partners to include these sums in what they will have to receive after liquidation, than they could themselves claim, if they owed the partnership, to compensate with what they owed what they would be found entitled to receive as their shares. *Id., No.* 535.

The administration of the affairs of a partnership, after its dissolution, is called *liquidation*, because its purpose is not to carry on the partnership, but, on the contrary, to terminate what has been begun, in order to render the values of the partnership liquidate, that is to say, certain and disposable, and consequently, divisible. It is not until after this administration has ended the labors for which it was instituted, that the partition can be effectuated. *Id., No.* 307.

The last right of every partner is to come to the division of the active mass, when all the debts have been paid; but he cannot demand this division until the liquidation has been completed. *Id., No.* 538.

What if Denver and Peck, rather than work for years for the benefit of the estate of Judge Hughes, who abandoned the business long years before his death, should themselves abandon it, and let all their clients employ other counsel? Is any man bound to toil and drudge for the family or creditors or partners of a deceased partner who had left him for years to do all the work, and quarreled with him because he had a brother in his office to do the work that his partners, deserted by him, could not do; who had engaged in business in another place, had entered into another partnership, was never seen in the office, took away his library, neglected what little business he pretended to attend to, and at last endeavored to disbar the working partner upon whose labor he had lived, preferring against him charges imputing dishonesty and fraud?

If Mr. Roane has the interest in the business that has been decreed to him, he must have the right to compel Messrs. Denver and Peck to carry it on; the right to compel them to carry it on diligently and efficiently; the right to supervise and oversee them; the right to advise and intermeddle; the right to see that this thing is done, in court and out of court, and the other not done. He is to be a partner, without labor, without expense, without care, without responsibility.

But there is no power that can judicially compel the survivors to carry on the business at all. If he could abandon it, so may they. If they were to retire at once from all the business, and their clients were afterwards to employ each separately, where is the law that would require them to share their earnings afterwards with Mr. Roane or the widow or creditors of James Hughes? He abandoned the business. Cannot they? Could they not have done it when he did, if he could do it? He thought the law was that if he made them do all the work, while he played State Senator four years in Indiana, and the idler to whom the office and office-work are odious, all the rest of the time, he could

nevertheless demand and his estate compel payment to him and it of an equal share of the fees, during the life of a generation. We have heard of the dead stretching his arm from the grave, to strike and punish an enemy. This is to stretch it out to grasp a share of the daily, weekly, and yearly earnings of other men, until the crack of doom.

We are strengthened in these convictions by the opinions expressed in an argument presented by another to the Aabitrators:

"The agreement of March 18, 1869, sometimes called the agreement of dissolution, may admit of two constructions; but in the end, it would seem to be of no serious consequences which of them is adopted:

"1st. It may be regarded as a modification of the original partnership, revoking it as to all business thereafter brought to the office, but renewing and continuing it as to all business on hand, and limiting it strictly to the business thus specified.

"2d. Or, it may be regarded as a complete and final dissolution of the partnership, and as a specification of the duties and intentions of the parties as to that business.

"In either case, the rights, duties, and obligations of the parties *inter sese* were much the same, whether they were to act as partners for a limited purpose, or as attorneys jointly engaged in the prosecution of certain specified cases.

"Let us first look at it in the light of a limited partnership:

"The relation of partners is one of such a confidential character as to be in its nature revocable at any time.

"Parsons on Part., pp. 401–402.

"In this case one partner unequivocally demanded that all such relations should cease, and the other partner promptly acceded to that demand. What more could be said or done to terminate this limited partnership, and remit the parties to the position of a joint employment and a mere community of interest in the business in their hands? If anything more could be needed, it was supplied by the action of Mr. Hughes in subsequently moving that Mr. Denver should be disbarred from practice. Is it in the limits of possibility that the relation of partnership, a relation which implies entire confidence, good will, and spirit of co-operation, could exist pending such proceedings as these? For it must be remembered that we are not now dealing with an ordinary commercial partnership, where the moneyed capital and good will of trade form the principal items, but with a partnership for professional services. There are many cases noted in the books where a dissolution is held to occur by the act of one of the partners which is inconsistent with the existence of the partnership.

"Parsons on Part., p. 400.

"If the partnership was not formally dissolved by the agreement of March 18, 1869, it was certainly dissolved by the subsequent acts of the parties; so that it had ceased to exist before the death of Mr. Hughes. The only difference would be as to the time at which the partnership relations ceased.

"Whenever these relations did cease, the three persons stood in the position of having been jointly employed in certain cases with joint fees—each one being entitled to an equal share of the fee only on condition of his doing an equal share of the work. If this relation commenced on the 18th of March, 1869, there should be allowed to the share of Mr. H. such portion of the fees as his labor after that time entitled him to, charging him with the money he received after that time.

"But if the partnership did not terminate until May, 1872, or until October, 1873, when the obnoxious motion was made, a like rule should be applied. Of course no services could have been rendered by Mr. Hughes after October 21, 1873, and he could be allowed nothing for moneys earned after that day.

"Even if the partnership had never been dissolved, the death of one partner could give his representatives no right to the services of the co-partners after that event. Where the whole capital consists of personal services, and those are withdrawn, the survivors cannot be bound to account for anything more than a fair allowance for services rendered up to the time of death. Law-partnerships do not admit of being "settled up," in the commercial sense. There is no merchandise to sell; the employments must be followed out to their final result, just as if no death had occurred. All the work remaining undone must be completed, and it would be absurd to say that the representatives of a deceased partner had a right to require the survivors to labor for years and divide equally the fees upon a case coming into the office the day before the death of the decedent.

"Even in commercial partnerships, where, upon the death of one partner, the others carry on the business, they are allowed a compensation for their services in so doing. Here it is all personal service, and an allowance for that would cover the whole case. We therefore think that the executor is entitled only to a fair allowance for the services actually rendered by Judge Hughes after the termination of the partnership, deducting the amounts received by him."

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§ 3.

THE PRETENDED CONTRACT OF AUGUST, 1869.

In *Const v. Harris*, 1 *Turn. & Russ.*, 525, the Lord Chancellor said: "Partnership accounts may be taken in various

ways; the distinction is, that in the absence of a special agreement, the accounts must be taken in the usual way; but where a special agreement has been made it must be abided by, provided the parties have acted on it; if not, I always understood that the articles are read in this Court as not containing the clauses on which the parties have not acted. * * * Considering the difficulty of now making up the accounts after an interval of four or five years, I cannot, at present, think the executors of the deceased partner entitled to insist on the articles."

It is claimed that there *was* a special agreement made between these partners. The letter of Mr. Hughes to Mr. Denver, of date August 13, 1869, and the endorsements of Messrs. Peck and Denver on it, constituted, the Court below has decreed, a legal and valid contract.

That might be; and yet, it would not, in the slightest degree, affect our argument in regard to negligence. Whether the law or a contract gave him the right to a certain share, or whether that right was created by the partnership contract or by a subsequent contract, negligence and fault and ill-faith will have the same effect.

What is thus held to constitute a contract is contained in a little space, and we therefore append it here:

"WASHINGTON, *August* 13, 1869.

Gen. J. W. DENVER,
Wilmington, Ohio.

DEAR GENERAL: Arthur goes this evening. Mr. Peck leaves on Monday. I am waiting on the Perry case. Before taking this journey I am making my will and otherwise providing for accidents. Mr. Peck and I agree that in case of the death of any one of us, his heirs or personal representatives, or their duly authorized agent, shall receive one-third of the fees in cases nearly finished, and twenty-five per cent. in other partnership cases. Do you agree to this? Answer here.

Yours truly,

(Signed) JAMES HUGHES.

(Over.) If you approve this sign it on the other side and return it.

This proposition has been submitted to me, and I agree to it.

(Signed) CHAS. F. PECK.

I agree to this, but with the express understanding that all the partnership obligations shall be first satisfied before any such division can be made at any time.

(Signed) J. W. DENVER.

WILMINGTON, OHIO, *Aug.* 18, 1869."

In regard to which we shall undertake to demonstrate:

1st. That the letter and Mr. Denver's endorsement never constituted a *contract* between him and Mr. Hughes. Of course, if they did not, there was none between either of these and Mr. Peck.

2d. That if they constituted a contract, Mr. Hughes repudiated and annulled it by repeated and uniform violation of the addition proposed, or condition stipulated by Mr. Denver, *which he never once regarded.*

3d. That if they constituted a contract, Mr. Hughes utterly forfeited and lost all right to demand execution of it, by such wilful negligence and disregard of his duties and obligations as would make its enforcement a fraud; and this because, also, he thereby annulled the whole consideration for it.

4th. That if they constituted a contract, it was formally and completely abrogated by Mr. Hughes himself before his death.

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1. There was no contract created. The letter of Mr. Hughes was in the form of a Roman stipulation. "We agree so and so, do you agree to this?"

The Roman law said: *Si quis simpliciter interrogatus, responderit, si illud factum erit dabo, non obligari eum constat. Non enim sic respondit ut interrogatus est. . . . . Cum adjicit aliquid vel detrahit obligationi, semper probandum est vitiatam esse obligationem; nisi stipulatori diversitas responsionis illico placuerit: tunc enim alia stipulatio contracta esse videtur.* (If one, interrogated simply, shall respond, *if that shall be done I will give*, it is settled that he is not obligated. For he did not so respond as he was questioned. . . . . When he adds anything to or takes anything from the obligation, it is always to be held that the obligation is destroyed: unless the variance of the responds is *on the spot* agreed to by the stipulator, for then a different stipulation is deemed to be contracted.) *Ulpian, L.* 1, § 3, *ff. de verborum obligationibus*, (*Dig.* 45, 1, 1, § 3.)

Mr. Hughes asked if Mr. Denver would agree that in case of his death his estate should be entitled to certain shares of the earnings. Denver answered, "*I agree; but with such an understanding.*" In effect he asked in his turn "Do you agree to this?" and he received no reply.

In *Eliason* vs. *Henshaw*, 4 *Wheaton*, 225, this Court said: "It is an undeniable principle of the law of contracts that an offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, *according to the terms in which the offer was made. Any qualification of or departure from these terms invalidates the offer unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation on either.*"

It is idle to say that the stipulation of Denver required no reply, because the law made it a term of the contract. It is insisted that the "partnership obligations" meant, not the obligations created by the partnership, (from one partner to the other,) but the obligations *of* the partnership, incurred by the partnership. It was not so *meant* by Mr.

Denver, but, in the other sense; but the phrase must speak for itself, and it is true that the most usual meaning of "partnership obligations" is obligations of the partnership or firm.

Then it is said that no partner *could* have a legal claim to a division of earnings until all such obligations *had been* satisfied. That is true; but, nevertheless, one could insist on such a division, or take his share in defiance of his partners' wishes; *as Hughes himself had always done, and always continued to do.*

When one is asked to agree to a certain proposition, to answer "yes" to a certain stipulation, he may refuse unconditionally, or he may propose any *lawful* condition, upon which he *will* agree, or may say, "I agree on such a condition, or with such an understanding;" and he will not have agreed at all until his condition is agreed to. He suspends his assent until then. He has a perfect right to propose as a condition the performance of a duty required by law, or the forbearance to violate a legal right of his own, or compliance with a legal obligation. Not that he can make the duty *more* a duty, the obligation *more* an obligation. But he can make the duty more likely to be performed, the obligation more likely to be fulfilled, by the *consequences* that will follow the violation of one or failure to fulfill the other; he can have guarantees for performance, making the abrogation of his own agreement a consequence of non-performance or of disregard of the condition.

The letter proposed a certain division, not while all the parties should live, but after one should die. Denver replied: "I agree to that; but with this distinct understanding, to govern while we all *live.* No such division can be made *at any time* until all partnership obligations have been satisfied." "I agree, with this understanding," is precisely the same with, "I do *not* agree *without* this understanding." That is precisely what it means; and if the counter proposition had been merely frivolous, or unconnected with the

proposition of Hughes, it was still absolutely necessary to accept it, in order to make an actual agreement on the part of Denver.

He chose to say: "I agree; but only with the distinct understanding that no partner shall, at any time hereafter, claim and take his share of a fee while any partnership obligation remains unsatisfied." And the legal effect of this was, "if one of you violates this understanding, this agreement will be naught;" or, more accurately, "If each of you does not assent to this understanding, I do not agree and there will be no contract."

The stipulation proposed by Denver required Hughes (on Mr. Roane's theory) to agree that he would not receive his share of any fee until after all the firm debts had been paid, and until each other partner should have received as much as he had. The practice of the firm had been otherwise. Whether he would bind himself to this was submitted to him to decide. There could be no contract until he should accept the proposed addition to it. He had either to accept or reject it. If he rejected it, there was no contract. If he accepted it he never afterwards failed to violate it. The most charitable conclusion from this is that he rejected it, and his acts are the best proof possible that he did so.

It could more plausibly be said that the endorsement by Mr. Denver agreed to the *principle* of division, to the proportions of fees to belong to the estate of a deceased partner, and only *postponed* the time of division until all partnership obligations could be satisfied; and if it had been, "no such division shall be made *after one partner's death*, until, &c.," it would be difficult to reply to the preposition.

But the language is not so; it is not even "no *such* division shall be made," or "*no* division shall be made," without more, but "no such division shall be made AT ANY TIME," and was therefore a stipulation for his security while both his partners should live.

Mr. Hughes had been all the time from the beginning, and continued to be until his death, indebted to his partners by having received of moneys earned, from $6,000 to $12,000 more than either of them. At the last balancing of accounts, he had received up to June 5th, 1873, in cash, $99,419.60; Mr. Denver had received $93,294.98, and Mr. Peck $93,505.93; and the balance against Mr. Hughes was larger by five or six thousand dollars at the time of his death.

Moreover, on the 13th of August, 1869, Mr. Denver held the note of the firm for $7,000, which he had paid at the request of Mr. Hughes on the 2d of June, 1869, of which Mr. Hughes owed him one-third, of course, and he had a lien on the receipts of the firm for two-thirds.

There was very sufficient reason, therefore, why, when the partnership had been dissolved, and Mr. Denver, dissatisfied with Mr. Hughes on account of his negligence, as Mr. Peck also was, and probably on account of his habits of drinking, *and others*—[*We* did not bring this into the record]—which had brought, Mr. Peck said, discredit on the firm; why, when Mr. Hughes was largely in advance of, and indebted to, his partners, and Mr. Denver held the note of the firm for a large sum, the latter should say, *You ask me to agree that in case of your death I shall work as well for your estate as for myself, paying it more than your fair proportion of the fees. Very well; I will do so, if there shall be a distinct understanding between us that neither of us shall hereafter, at* ANY TIME, *claim a division of fees until* ALL *partnership obligations shall first have been satisfied.* He had the *right* to make this condition—to demand this understanding; and without it there was no agreement by him at all.

He did not mean "with the distinct understanding *on my part.*" That would not control Mr. Hughes. He meant "with this distinct understanding *between us;*" and there could *be* no such distinct understanding until Mr. Hughes assented to it.

The assent of Mr. Hughes is not to be presumed or inferred, because he was only asked to assent to what his part-

ner had a right to demand. It did not follow that he assented to it because *he ought* to have done so. He was not asked to assent to this: "I have no *right* to take one-third of any fee until all partnership obligations are satisfied;" but to this: "I *will not force* a division of fees until then." If he had *acted* in accordance with the understanding insisted on, there would be reason for saying that he did tacitly accept and assent to it.

But he did not mean to assent to it. He meant to claim the benefit of what he chose to consider a contract, and repudiate the proposed understanding; for he wholly disregarded it, in every possible case collecting his full share of a fee, and, in one case, a large amount from Duncan, Sherman & Co., against the protest of his partners.

Mr. Roane states that Judge Hughes never said a word to him about the letter of August 13, 1869, but only handed it to him, when it was returned by General Denver, to file among his papers. If he regarded it as constituting, with the endorsements, a contract, it is singular he should never have spoken of it to any one in the world as such, and all the time acted in violation of it.

He never accepted the condition by either word or deed. By his acts he repudiated and rejected it, no matter what it meant. He neither performed his duties nor complied with his obligations as a partner, nor did he allow the pecuniary obligations of the firm to be settled and satisfied, but to the day of his death insisted on a division of fees, in the teeth of the express words in the condition, "before any such division can be made at any time." This was a series of refusals to accept or comply with the condition.

According to what is claimed to have been his construction of it, it required something to be done in his lifetime, as well as after his death. It was necessary for him to signify his assent, and permit all accruing fees to be applied to paying the debts due by the firm, and his debt to it, before "any such division" as he proposed should be made, "at any time."

After persistently and uniformly treating that condition as non-existent, he was estopped, and so is his executor, from alleging that it was in force and binding on him. If it was, he was guilty of gross wrong and fraud, and no court will hear a man allege his own turpitude or relieve him of the consequence of it. If there was a contract created by the letter and endorsement, it was *in every part* binding on him as well as on his partners; and his course of conduct and practice must determine what his intention and understanding were. He treated the proposition as not having become a contract. It cannot be made one, against his will and acts, for the benefit of his estate.

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2. If the letter and endorsements did constitute a contract, it was all *one* contract; and Mr. Hughes could not repudiate one portion or clause of it, which was in part the consideration for the residue, and keep life in the residue.

If he meant that his partner should understand that he assented to the counter-stipulation, he either assented to it or he did not. If he did not, there was no contract, *because* he did not; and it was fraud and overreaching to permit his partner to suppose that he had assented when he meant habitually to do precisely that which his partner proposed to prevent, and which he, assenting to the stipulation, could not honestly do. If he *did* assent, and there was created a contract, then he either meant not to keep the promise contained in his assent, and thus was guilty of circumvention and deception, and the law said of his partner, *Non tàm paciscitur quàm decepitur;* and to Mr. Hughes, *Ne tibi malitia tua sit lucrosa;* or he meant to keep his promise, and afterwards concluded to break it, which was also fraudulent, but not as shamefully so as to make a promise, meaning at the time to break it.

If it is to be held that by retaining the letter, and expressing no dissent from the proposed addition, he tacitly

assented to and accepted it, then he did not comply with it, but, on the contrary, continually and persistently violated it, and treated it, and of course the whole, as null and inoperative. He could not disregard the condition, without waiving that of which it was the condition. He proposed somewhat, and asked Denver if he agreed to it. Only on condition, Denver replied, that such and such things shall be first permitted by you to be done. Making no reply to this, leaving it to be inferred and supposed, if you choose, that he assented to this condition, he seized the first opportunity that offered, and every other one all his life afterwards, to prevent what he had to permit and assist in, to give himself a right to what he had proposed.

The learned counsel for the executor asked Gen. Denver if Hughes had not the same right to collect fees as Denver and Peck had? Yes, to collect *for the firm*, and with what he collected to pay the partnership obligations, including the note held by Denver. Not otherwise, if he had assented to Denver's condition. Of course he had the same right to *receive* money as the others. But he had *none*, to apply to his own use what he received, so long as there were partnership obligations unsatisfied. Nor, indeed, had he the same right to *receive* as they, for himself, but only to pay over to them, so long as he owed them, by having received more of the earnings than either of them had. He could *collect*. His right to receipt in the name of the firm was the same as theirs. But what he collected was not *his;* no part of it was *his*, as long as the firm was in debt, whether to strangers or to Denver, or so long as he (Hughes) was in arrears. He could lawfully collect and receive. He could lawfully use and apply, *honestly* only, receiving for and paying to those whom the firm owed, or to his partners, whom *he* owed.

3. If the letter and endorsements constituted a contract, all right under it could be forfeited, and was forfeited, by

Mr. Hughes, by continuous, uninterrupted, persistent, gross negligence and inattention to the business, by wilful *abandonment* of it, and *refusal* to attend to it, *so* gross as to amount to a fraud upon his partners and clients.

In *Const vs. Harris*, 1 Turner and Russ., 523, the Lord Chancellor said: "In *all* partnerships, whether it is expressed in the deed or not, the partners are bound to be true and faithful to each other. . . . . It must be considered whether the plaintiff had not conceived himself at liberty to withhold more of his personal attention from the concern than he could withhold, entitling himself to call on the other partners to do their duty. . . . . If he chose to discharge his duty in a more limited way, *whether that would not destroy his right to call upon them to do their duty towards him?* . . . . . *Though there is a written agreement*, nothing is more clear than that if there has been a long course of dealing, or one not long, but still *so* long as to demonstrate that they have all agreed to change the terms, they may be held to have changed them *by conduct.*"

In Geddes *vs.* Wallace, 2 Bligh, 270, the Lord Chancellor said: "Whatever may be the language of a partnership deed, the dealings and transactions among the partners may be such as to amount to distinct evidence that some of the articles in that partnership deed were waived by all parties, and that some of the articles in that deed were not to be considered as rules which should regulate the rights and duties of the partners." . . . "The law, as I apprehend, is that the transactions of partners are always to be looked at, in order that you may determine between them, even against the written articles, what clauses in those articles will not bind them, provided those transactions offered a higher probability, amounting almost to demonstration."

In Jackson *vs.* Sedgwick, 1 Swanst., 469, Lord Chancellor Eldon held that where a special agreement for taking accounts had been made by partners, it must be abided by,

provided the parties had acted upon it; but if not, they were to be read in the court as not containing the clauses on which the parties had not acted.

It is undoubtedly true that if the partners see fit to agree among themselves that when one dies his estate shall be entitled to receive, until all the business ends, his full share of all earnings of the survivors, this agreement, fairly made, and the right to its benefits not forfeited, must govern, however onerous it may prove to the survivors; for it will be the law made by themselves for themselves, as fair, when made, for one as for another.

But it is equally clear that the right to insist on it *may* be forfeited and lost by neglect or misconduct. There must be mutuality. It is an implied term of every such obligation that one of the partners shall not withhold his services from the firm, and throw the labor and responsibility on the others; shall, during his life time, and while able to do to, do his equal, honest part toward earning that which his estate is to share.

For, otherwise, to the agreement, "In case of the death of one of us, his estate shall be entitled to one full third of all fees or earnings afterwards received," this would be added by implication: "even if he should, from this time forward, shamefully neglect and virtually abandon the business, and relieve himself of labor by throwing the principal burthen of it on his partners."

Such a contract cannot be enforced unless all its material conditions, written and unwritten, have been complied with by the deceased partner in his lifetime. And "in all partnerships, whether it is expressed in the deed or not, the partners are bound to be true and faithful to each other."

That it will probably prove a hard bargain for the survivors is an additional reason for requiring entire good faith as an indispensable condition of retaining the right to insist upon it.

Moreover, it is more important in a law partnership than in perhaps any other that entire good faith should be maintained, and that no partner should deprive the firm of the benefits which they have a right to expect from his assistance—the application to cases of his ability, the aid of his learning and eloquence, and his actual labor, diligence, care, skill, and attention. By denying to the firm the benefit of his ability and learning he may do it mortal injury. It may be impossible for his partners to supply his place; *and the more one deprives his firm and partners of, by his abandonment or neglect, the greater the wrong and the less the excuse for it. The more one withholds, the less he deserves.*

If the deceased partner has wholly failed to keep an express or implied condition, he has not entitled himself or his estate to the benefit of the agreement. The condition is an essential part of the agreement, and if he fails to observe it, neither he nor his representatives can claim observance of the residue. He in fact repudiates it.

It cannot be held that Mr. Denver, in reply to the stipulation of Mr. Hughes, said: "I agree that you shall render no service until you die, and that Mr. Peck and I shall do all the work, and after your death continue to work for years, and pay you and your estate a third or even a fourth of all that our labor earns."

No matter what Denver meant by the phrase "*partnership obligations satisfied;*" the law held each partner bound to the equal performance of duty; to that which he says he meant by the phrase.

Mr. Hughes could not entitle himself to what he demanded, except as a co-worker under the agreement of dissolution. A condition of that was that each should devote himself faithfully to the business of the firm. In agreeing that the estate of one dying should have a certain share of all fees, earned or unearned, it was also a condition, in reason, justice, law and common sense, that he should do his duty as a partner while he lived. If it *was* not expressed, and he neglected

the business grossly, he *forfeited* his rights under the agreement.

For, otherwise, it would read thus: "If one of the partners shall henceforward grossly and utterly neglect the business and virtually and substantially abandon it during five years, and then shall die, his estate shall have one-third of all fees in cases then nearly finished, and one-fourth of the fees in all others, though little or nothing may have been done in many of them, and the other partners may have to toil in them ten years."

There would be no mutuality in such a contract, and a court would decree rescission of it, for want of consideration, if not for gross unfairness.

The contract made, if one was made, was "if a partner shall faithfully and honestly do his part as a partner, and give his time, attention, and diligence to the business of the firm as a partner should, then, and when all the debts of the firm are paid and its obligations discharged, his estate, if he dies, shall receive," &c.

If the contract was not *either* that each should be so entitled, *if* he faithfully did his duty and furnished his fair share of intellectual and physical labor, *or* that he should be entitled, even if he abandoned the whole business, and from the moment the contract was made should refuse during all the residue of his life to do anything at all—if not one or the other of these, what was it?

If it was the former, Mr. Hughes forfeited all right under it by uniform and gross neglect of the business, and by casting *all* the real labor on the shoulders of the others. If it was the latter, it was inequitable and absurd.

It was the former, because the law makes it the duty of every partner to do his fair part of the labor of the firm. That was the *whole* consideration of this contract; and no man can enforce a contract when he has deliberately withheld or annulled the consideration and persistently violated one of its material terms.

Mr. Hughes chose not to rely on the law of partnership in regard to his interest in the fees. He preferred to make a special contract. If he did so, he put himself in the grasp of the law that governs in all cases of contracts. It was a contract for his services, as well as for his compensation. If he meant, when he proposed it, to cease to render any service, it was a fraud to procure it. If that purpose only began afterwards, it was a fraud to carry the purpose into effect, and after refusing the service to demand the compensation.

4. If the letter and endorsements constituted a contract, it was abrogated by Mr. Hughes, before his death. On the 14th of May, 1872, three months after Mr. Peck was prostrated by sickness, and Mr. Hughes refused, by acts if not words, to assist Mr. Denver *at all*, *in any way*, in any of the large number of cases pending and for trial in the Court of Claims, the patience of Mr. Denver became exhausted. He had not had experience in that court, having attended to but a few cases there, and Mr. Hughes had been one of the judges, was esteemed, it is said, an able lawyer, was the senior member of the firm, it is said, bearing a leading and directing part in it, and of far greater value to the firm than either of his partners. We will not put the matter on that ground. It is not true. But Mr. Hughes was quite competent to manage the cases there; and the firm and its clients had an unquestionable right to insist upon his services. He sturdily persisted in rendering none, opposing simply, to the solicitations of his partner, the immobility of inertia.

Then came a quarrel about the presence of Mr. Arthur Denver in the office of the firm, into which Mr. Hughes never went. Mr. Hughes demanded that he should be expelled from it, although it is in proof that he had been, with Mr. Hughes' consent, jointly interested with the firm in much business, and had, by his unaided exertions, gained cases for the firm, the fees wherein were shared by Mr. Hughes.

Mr. Denver resented the demand, and in his reply, of May 14, 1872, informed Mr. Hughes that the true cause of his course was his almost total neglect of the business of the firm. He refused to turn his brother out of the office; and in conclusion said:

"After what has occurred, it is time for us to separate. We can, as soon as Mr. Peck gets back, divide our business fairly, or get others to do it for us; but however it may be done, I demand that the business relations between you and myself shall be definitely and finally closed at the earliest moment practicable."

This was, of course, a demand for the utter abrogation of the provisions of the agreement of dissolution, by which the remaining business of the firm was to be closed up by the three partners as partners: a demand for a division of the cases among the partners, and for the complete ending of all joint relations between them. If the letter and endorsements were a contract, it involved a demand for the abrogation of that contract; because that could only be carried out by continued joint conduct of the business.

To this, Mr. Hughes replied, on the 10th of June, 1872:

"I presume that you carefully considered the full scope and effect of your demand before you made it. There is but one course open to me consistent with the principles which I observe as a rule of action, and that is at once to accede to your demand, which I now do. I am persuaded that, in your present temper and position, no amicable negotiations will suffice to 'close the business relations definitely and finally' at present existing between us.

"I do not intend to conduct in person any business of a nature that will lead to controversy with you, and will therefore put this business in the hands of counsel, who, when selected, will give you notice of the fact.

"You are not bound, however, to wait for the appointment of counsel on my part to follow up your 'demand' by proper legal proceedings, to 'close definitely and finally'

our business relations 'at the earliest moment practicable.'

"Do not charge any delay that may occur to me. I will afford you every facility in my power to accomplish the purposes of your demand, taking care always to protect the interests of our absent partner and our numerous clients.

"In the meantime, as our firm is already formally dissolved, I beg leave to remind you that, except by courtesy, consent, or express authority, no single member is authorized to act for the firm."

It seems clear to us that by this demand and consent the contract of 1869 (if it was one) was abrogated. The *demand* was a refusal to suffer that longer to exist; it called upon Hughes to consider their relations as partners at an end. It was a declaration by Denver to him that he would no longer work with him or for him. The moment that Hughes acceded to it, the relations between them, and the contract, ended. It is true that nothing was done in regard to dividing the business, and it went on as before.

But after this Mr. Denver never acted for the firm. He and Mr. Peck acted for themselves. After this, Hughes never once entered the office to look after any of the business of the dissolved firm. He abandoned it altogether. He then had in his hands two cases only. He abandoned one and had Mr. Roane to attend to the other.

After that, also, he attended to two or three cases in the Supreme Court, perhaps; but he never consulted with his former partners, nor concerned himself about the firm-affairs. If he selected counsel to make the separation and division of cases agreed to, the counsel never notified Mr. Denver.

He partly drew a bill in chancery for a division, and laid it aside unfinished. But, on the 19th of October, 1873, (he died on the 21st,) as if he desired before his death to cancel all relations between himself and Mr. Denver, he took a step that brought everything to a close, abruptly ended those

relations, consummated what Mr. Denver had demanded, and shattered the pretended contract like a thunderbolt.

He appeared in person in the Supreme Court of the District of Columbia, and preferred against Mr. Denver charges, importing dishonor and infamy, charges of unprofessional conduct; and prayed that for that which he charged, Mr. Denver might be expelled from the bar. He demanded their consideration by the Court, and they remained in the Court until after his death.

Disbarred, Mr. Denver would have been disqualified to carry on the business of the firm. Therefore, what Mr. Hughes did was to invoke the judicial power to *incapacitate* Mr. Denver to comply, in case of the death of Mr. Hughes, with his supposed obligation under the supposed contract, by continuing to manage in Court the cases of the firm, and earn thereby moneys to be shared with the executor of Hughes.

It is too clear to need argument or illustration that Mr. Hughes could not stand there before the Court, holding in one hand his charges and in the other the pretended contract, and say to Mr. Denver, "I will expel you from the bar of this Court, and will put it out of your power to labor in the cases that we had together as partners. You shall not be able to work in them any longer. You are not fit to be entrusted with them. I sever all connection with you. You shall no longer personally attend to the business; but, if I die, you *shall* carry it on to the close. You shall prosecute and conduct the suits; and out of the earnings you shall pay to my executor and partner one-third of all fees and compensation in cases that may be nearly finished when I die, and one-fourth in all other cases.

Necessarily, the filing of the charges abrogated all the agreements, and especially that of August, 1869, if it was an agreement; not because it could annul or affect any right of Mr. Hughes, actual at that date, for that it could not, but because its direct and special purpose was to inca-

pacitate Mr. Denver to work for the joint benefit in the future.

The executor succeeds to the person of the testator. On what ground, after the testator had preferred against Denver charges that imported infamy, and claimed the right therefor to disenable him to attend further to the business of the firm or be recognized as counsel in any case, anywhere—on what ground can the executor, or rather, could the testator, rely upon a previous contract binding Denver to attend to the business of the extensive firm, *as* counsel, for the benefit of Hughes, or of the executor of Hughes?

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§ 4.

Is there any certain, fixed, settled rule, by which to determine to what the estate of a law partner, dying, is entitled, on account of the business of the firm, thereafter to be done and conducted? If not, the courts must make one. In partnerships for the prosecution of claims against the Goverument, great delay must be expected in many cases, and it will often happen that one person will die, and his place be supplied by another, and that sometimes two or three will take thus, one the place of the other, in succession.

A., B. and C., agree to prosecute a certain claim, having equal interests in the fee, to be paid in case of success. A. soon after dies, perhaps before the claim is presented. D. is associated with the heirs in his stead. Then B. dies, and E. takes his place; then D. and F. takes his. C. lives to the end, and is clearly entitled to one-third of the fee. How to divide the other two-thirds?

Such questions may easily arise as to a firm of lawyers. It is not uncommon for one member of a firm to die, and another to take his place and assist in carrying on the old cases. Is he to be paid for this service; and, if so, by whom?

Whatever the rule of law, equity or justice may be, in case of the *death* of a partner, it must even more strongly apply in case of his utter neglect and virtual abandonment of the business, when living. *More* strongly, because his death is involuntary, and his neglect and abandonment voluntary and intentional.

There must be *some* rule. It is evident that where there are originally three partners, and in all three successors, there will not be *thirds* enough of the fee to pay one-third to each of the six. It is not possible, either, that the measure of the Chancellor's foot is the rule in each or any case. It cannot depend upon his mere whim and discretion. It cannot be mere matter of guessing.

One thing is certain. For all service rendered by a law firm after one partner's death the client cannot be required to pay any persons but those who render it. He cannot be made to pay more than *they* earn. He cannot be made to pay for services of one who is dead, or renders none.

And only what is paid for the services of a person can be claimed by him or his estate.

The only just rule, it seems to us, will be this: As to fees wholly earned and due at the death of a partner (if by neglect he has not forfeited or lessened his right,) his estate is entitled to his equal or stipulated share; and as to all other business, it is entitled to be paid what may be equal to the actual value to the firm of his services to client and firm up to the time of his death, as compared with and a part of *all* services (as agreed to be paid for) rendered and to be rendered, that is to say, compared in a given case with the whole fee; and in the business generally, with all the net earnings, *impensis deductis*. He is entitled, in fact, in the absence of forfeiture by neglect, bad faith, or otherwise, to the actual cash value of his share in the business at the moment of his death. If there are three partners, and one dies when business remains, estimated to be worth, *impensis deductis*, $30,000, and two-thirds of the work and labor

has been done, the firm has earned $20,000 of the value, and $10,000 remains to be earned. His share is therefore worth in cash one-third of $20,000; and that is the value of his services up to that time.

Upon the death of such a partner, his estate retains no connection with the cases to which he may have attended. It is precisely as when two or three lawyers, being jointly retained in a case, one, after rendering some service, dies. The survivors do not afterwards work to earn money for his estate. It is entitled only to be paid the fair value of his services up to his death, with reference to the values of the case and fees.

The estate of Mr. Hughes is entitled, if he and it have not already been fully paid, to so much as, added to what he and it have received since the dissolution, or since his abandonment of the principal business, will be a fair equivalent in value for the services rendered by him to the business of the firm. That must be the rule in case of death of a partner; for—

1. His death (or abandonment) withdraws from the partnership all the capital that he had invested in the firm, and all his care of and attention to the business. He earns nothing more; he renders no further service.

2. The engagements of the firm with its clients end by his death, and if the survivors continue to attend to the cases entrusted to the firm, they do so under a new engagement, in which his estate has no interest. His estate is entitled to be paid for the services he has rendered in all the business, for the full, fair value of his work, labor, application of knowledge, and intellect, comparing his services with those of the other partners.

3. The client in every case in the hands of the firm has the undoubted right to employ another lawyer in place of the deceased partner, to act with the survivors, and to pay to him all that the deceased partner, if he had not died,

would have earned or been entitled to for his services from the day on which he did die—*i. e.*, his share of the whole fee less the value of his services up to the time of his death, or, in practice, his share less what it would cost to employ another in his stead. Of course his interest in the fee, except for the value of his past services, ends with his death.

4. The surviving partners, continuing in charge of the case or cases, have a perfect right, *and it will often be their duty to their client*, to employ other counsel to take the place of their deceased partner, and in that case his estate would be entitled only to so much of his share of the whole fee as it does not take to employ the new counsel. It cannot demand that the survivors' shares shall be diminished by this necessity. In practice the compensation of the new counsel might be more or less, but it *ought* to be, of course, so much of the deceased's share of the fees as the services of the new counsel are to be worth compared to all the service that the deceased, living still, would have rendered in the whole case.

5. The surviving partners are under no obligation to work for the estate of the deceased. If, instead of employing new counsel to do the work which, if he had lived, they would have the right to require him to do, they do it themselves, *they* are entitled to what they would have paid the new counsel. And nobody can complain if they choose to abandon the business altogether.

6. If the estate of Mr. Hughes, in the absence of any other agreement as to division of fees than the partnership articles, would have been entitled to one-third of all fees, as well in cases unfinished as in those finished, at his death, and even in those barely begun, or merely received, than if Mr. Peck had died afterwards his estate would have been even more entitled to another third, for his longer service; and if then Mr. Denver had died, his estate would have been entitled to the last third. If the estate of each or of either would have been so entitled, it could only be because

the client was bound to pay the whole fee. If half the cases were unfinished, and many hardly begun, when the last partner died, how would the client fare? How would he employ new counsel?

The estate of Mr. Hughes is not entitled to a third of all fees under the articles of partnership, *unless the estates of Messrs. Peck and Denver would each be entitled to a third, if they too had died.*

Now, all these principles apply even more strongly, where a partner, instead of dying, abandons the business, and by his own act is dead to the firm.

The executor of Mr. Hughes is not content to have the value of his services. He desires a vast deal more. He asks what was proposed by his testator's letter of August 13. He demands not only a third of all that Messrs. Peck and Denver *have* earned since March 13, 1869, but a fourth or third (as the case may be) in all that they may earn for years. He is to be taskmaster, and they are to toil for him. If he can claim this interest in their earnings, he must have equal right to *compel* them to earn what he has a right to, to compel them to work faithfully and diligently, and bear the burden and heat of the day for the benefit of the widow, heirs, executors, partners; who knows whom? They would be little freer than the swineherd, on whose collar was inscribed, "Gurth, born-thrall of Cedric the Saxon."

But, *nemo potest cogi precisè ad factum.* The executor of Mr. Hughes cannot compel Denver and Peck to go on with the business. He cannot be their taskmaster. If they wholly abandon the business, he will have no action for damages against them; and if the law be that they must share their earnings with him, they can cease to earn, because they can cease to work.

If the firm had continued to exist, up to the day of Mr. Hughes' death, his executor would not have taken his place in the firm. This proves that he could have no interest in the future earnings, because he could not assist in earning.

And if he should assist, he would earn for himself, and not as executor. With the right to share earnings must co-exist the duty and obligation to help earn the wages and reward of labour which they are. As he could not be substituted in the place of Mr. Hughes, by law, so he could not in fact; for he could not contribute the identical, specific learning or ability or labour of Mr. Hughes *himself*, and *these* the firm and clients bargained for. He might contribute *more*, but not the *same*.

In omnibus quidem, maximè tamen in jure, æquitas spectanda est: In all matters, indeed, but especially in the administration of justice, equity is to be steadily kept in view. We have endeavored to show that equity requires, in this case, that not a third or a fourth part of the fees earned, but the value of the services of Mr. Hughes and his interest in the business, under all the circumstances, at the moment of his death, should be decreed to his executor.

They have not merely the *power*, but the right, to return their business into their clients' hands. The law did that at Mr. Hughes' death. But if they have chosen to continue in charge of it until now, they have the *right*, which they had the moment he died, to close their connection with all the cases and claims that required further attention. They would then have been entitled only to compensation for the value of their services up to that time. If Mr. Hughes or his estate had a right to more,—if he or it had a right to an equal interest or an unequal one in what they might earn after his death, he or it had or has a right to require them to continue to attend to the business as surviving partners. That they cannot be compelled to do this, proves that his estate has no interest in the earnings since his death.

It is quite evident that if this is not the law and rule of partnerships of workers, such partnerships would commend themselves only to demented men. A claim against the Government, or a suit for land or upon a will, may last a quarter of a century. And if when such a claim or suit is entrusted

to a firm, and one member dies soon after the inception of proceedings, one-half or a third of the fee to be wholly or chiefly earned by future service must be paid to his estate, and, *therefore*, the survivors cannot employ another to assist them in his stead, the two grave consequences will result—that the client will be defrauded, by being made to pay for services not rendered; and that the survivors must work, perhaps half a life-time, for the benefit of strangers. It is not possible that the law, which in the matter of partnerships consists wholly of judicial deductions of equity and reason, can be both irrational and iniquitous.

When Mr. Hughes died *there was no existing contract*, bargain, agreement or understanding between the parties in regard to the division of fees, except that in the original articles of partnership. The other partners were only bound to pay his estate the fair value of his actual services from the day of dissolution. Upon any reasonable estimate of their value, he had already been overpaid. He had chosen his own course, and followed it diligently. Refusing to share the burdens of his partners, and determining to attend only to cases in the Supreme Court, he had done even that negligently, inefficiently, and to the injury of his partners.

What has the executor shown him to have done ably, industriously, thoroughly, diligently, since March 18, 1869, to entitle him even to what he has received? What has there been in his services, his inattention, his gross dereliction of duty, or in his treatment of those who had been his partners, that makes it a duty for them to give his estate part of what they have earned, or to work and earn more for it in the future?

After all, the best mode in which to prepare either to argue or to decide a case in equity, for counsel or judge, is first to study the facts, and then to endeavor to determine what is right, just, and fair in the case between man and man. Whatever is found to be so, the law of the court will rarely fail to require the court to decide.

Mr. Roane, testifying, has endeavored to show that the payment to him of $3,000, was intended as a division equally of $9,000 on hand, of fees received by the surviving partners of the firm, and was an acknowledgment and ratification of the supposed "contract" of August 13–18, 1869. The testimony of Messrs. Peck, Denver and Arthur Denver effectually disposes of this pretence. In fact, Mr. Roane's own receipts for $1,000 and $2,000 disprove his own testimony. Mr. Peck expressly says that it would have been an act of extreme ill faith on his part towards Mr. Denver, for him to have admitted the existence of any contract entitling the estate of Hughes to one third of any fees, because he well knew that this was denied by Mr. Denver. It is not possible to find in the testimony any single fact or circumstance that authorized Mr. Roane to assume that there was any such admission or recognition.

And his idea that a new contract was effected by his letter to Mr. Peck, agreeing, on what he calls conditions, to the compromise with Hunton, is equally baseless. It is not worth while to waste time on that. His letter only demanded payment to him of the share of Mr. Hughes, without a syllable as to the amount of his "share." And if the assent of Mr. Peck is to be inferred to this demand or condition, that of Mr. Denver cannot be, no matter what the letter would otherwise amount to.

These convictions also are confirmed by the argument presented to the arbitrators, part of which we have quoted, and the residue of which is as follows:

"Was the instrument, dated August 13th, 1869, even a valid agreement? It is a letter to Mr. Denver, by which Mr. Hughes made a proposal that if one of the partners should die, the other should continue their services and pay a certain portion of their earnings to the representatives of the deceased. Mr. Peck first accepted the proposal, but

before this could constitute a contract it required the acceptance of Mr. Denver. It is not and does not purport to be a contract between two persons, but between three. Mr. Denver accepted it with this qualification: 'I agree to this, but with the express understanding that all the partnership obligations shall be first satisfied before any such division can be made *at any time*.'

"It is objected that the qualification is merely that which the law would imply, and therefore the acceptance is unconditional. An examination of the surroundings facts, by which a contract must always be construed, will show this position to be untenable. At the time Mr. Denver wrote this acceptance and returned the paper to Mr. Hughes, he held the note of the firm for $7,000, then several months over-due, and Mr. Hughes owed the firm some eight thousand dollars for his over-draft. Mr. Denver being then asked to enter into a new arrangment about fees, replies: 'I will, provided that before any division of fees into either *thirds* or *quarters* AT ANY TIME shall be made, these partnership obligations shall be satisfied.' In effect, he says: 'I will do what you ask, provided you do all the law requires of you; that is, divide no more fees at *any time*, until the partnership obligations are fully satisfied;' *e. g.*, if I hold the note of A for $7,000 past due, and he proposes to buy an estate from me for a price named, and I accept his offer on condition that he pays this over-due note within ten days, could he compel a conveyance of the estate, without showing the payment of the note? Would it lie in his mouth to say that he was already legally bound to pay the note, and that I could not legally offer him any further inducements to comply with his engagements?

"So in this case, in point of strict law the fees coming in should have been applied to pay the firm note, and to equalize the partners' accounts, before any division of fees should have been made. Mr. Denver was deeply interested in having this done, and when further changes were proposed

to him, he thought it a fit opportunity to insist upon his rights, and he makes his consent to the proposed new arrangement depend upon the condition that no fees shall be divided '*at any time*' without the firm obligations being first satisfied. It certainly does not lie in the mouth of Mr. Hughes' executor to say that such was the law, and Mr. Hughes was bound all the time to pursue the course Mr. Denver required. The answer is, that he failed and refused to meet Mr. Denver's requirements, and the fact that a double obligation rested upon him does not excuse the failure.

"The weakness of the plaintiff's case arises from his failure to give any effect to the concluding words of Mr. Denver's acceptance, '*at any time*,'—that is, whether it be before or after the death of one of the partners. These words must be entirely rejected, or they must have given to them the effect already stated.

"If the paper of August, 1869, was an agreement originally valid, what effect does it have upon the rights of the parties to this controversy?

"It was merely supplemental to and part and parcel of the agreement of March, 1869. The two must be read and construed as if they were one agreement.

"It is then agreed that *the business on hand shall be closed up as rapidly as possible by the members of the firm, as partners under their original terms of association, and in the firm name; and in the case of the death of one, his heirs or personal representatives, or their duly authorized agent, shall receive one-third of the fees in cases nearly finished, and twenty-five per cent. in other partnership cases.*

"This last clause is manifestly intended to continue the benefits and advantages of the partnership to the heirs of one who should die. It became one of the terms and conditions of the partnership, but which would only become operative in a certain contingency. Its object was to lengthen out the continuance of the partnership, and carry

it beyond the term when it would ordinarily cease; but in the very nature of things it presupposes that the partnership will continue until one of the persons shall die. It would be preposterous to continue this clause in force when the whole foundation upon which it rests has been demolished by consent.

"The entire consideration of this clause is that the parties are closing up certain business as partners, and if, while so doing, one of them dies, his heirs shall receive a certain portion of the fees thereafter. But before any death occurs they abrogate all such relations, and refuse to hold any such position towards each other.

"Mr. Hughes in his lifetime says he consents that all his business relations with Mr. Denver shall cease, fails and refuses to have anything more to do with their joint business, holds no further intercourse with him, moves to disbar him. And yet his executor claims that all the time he retained a lien upon Mr. Denver's *professional services*, and in all this never intended to release him from the obligation to earn fees for the benefit of the legal representatives of the man who formally demanded of the court of the district, that he should be disqualified, disenabled, incapacitated, declared incompetent and unfit to be his partner or to attend to the business of the dissolved firm.

"It is perfectly plain that this was but an agreement incidental to the partnership, prospective entirely in its character. When the partnership fell, all such arrangements looking to the future conduct of the partners fell with it."

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§ 5.

ANCILIARY QUESTIONS.

Some of the exceptions to the report of the Auditor reproduce questions that were necessarily decided by the principal decision in the court below. The foundations for *these*

exceptions were laid, and the exceptions taken, to demonstrate more cogently, if possible, the errors of the decree; and as to these and some others, something is proper to be said.

Non est lucrum, nisi damnis deductis, is a general principle of the law of partnership and joint adventure. Where the capital of a society is money, goods or other values, the *losses* consist of diminutions of these, as profits are the increments of them. Losses are lessenings of capital or profits.

What are the losses of a partnership of professional men or laborers? They own no joint property, as their capital. Their *profits* are their earnings, the fruits of their labor. Their capital consists of their intellectual and physical ability to work and earn. They invest in their business their ability and knowledge, their time and labor, and what it costs them to live. For in the prosecution of their business they must use time, must work, and must support themselves.

If a law firm has five cases, on each of which it bestows equal labor, each of which requires the use of equal learning and ability, and each of which consumes an equal portion of time, valuable, as all time is, to professional and laboring men; and if of these five cases they lose two, receiving no compensation in them, and win three, is not the losing each case a loss of the firm? If they lost all, they would fail to earn their support and the support of their families, would *lose* out and out all that they expended during the year for current expenses of living and of their business, and could be fairly and reasonably supposed to lose such amount beyond that as they ought reasonably to have, for moderate savings, by reasonable remuneration for diligent industry. What a man *loses*, his *interêts-dommages*, is not only the actual loss he has sustained, but the reasonable gain he ought to have made—not only the *damnum emergens*, but the *lucrum cessans*.

The time and labor that men expend upon their business,

has a money value. They are worth what, otherwise employed in a like business, they would produce or earn. If a man rents a cotton plantation, and his crop is a dead failure, is his year's loss no more than the *money* he has actually expended? Surely no one ever thought so who had tried it. He has certainly lost what his time and labor were reasonably worth; that is, what they would have been worth, let to a third person, or employed in another manner.

Alas! loss of time is the most irreparable of all losses; and we feel no loss so heavily as that of our unprofitable years! and surely labor has a money-value.

Certainly such losses should fall equally on all who are to share in the earnings. *Nulli sunt fructus, nisi impensis deductis;* as, *non sunt bona, nisi æe alieno deducto.* Before dividing the fruits of a farm, the expenses of raising the crops, of producing the fruits, must be deducted, and these include, if two only of three associates have expended their time and labor, the fair reasonable value of that time and that labor, and all their personal expenses. It is only in that sense, that one otherwise engaged, for whom as much as for themselves the others work, is entitled to his one-third of the fruits.

We have shown that, before the death of Mr. Hughes, during the years 1871, 1872, and 1873, this firm had thirteen large claims, some for millions, before the British and American Commission. These were managed *exclusively* by Mr. Denver, Mr. Peck being constantly engrossed with the other business, and Mr. Hughes occasionally toying with a case in the Supreme Court. The papers in the cases are comprised in eight large volumes, and the labor and expenses were very great. Of these cases, one only was gained. In all such cases, the losses would be equal to all, be really borne by the firm, if all worked with equal diligence and fidelity; but if one expended little time, and less labor, during those years, on half a dozen cases only, in which nothing was required but argumentation, the loss did

not in any measure or degree fall on him; and if he is to have one-third of the fee in the case that was gained, ought not he to contribute, out of it, to his partners, one-third the value of the time and labor lost; or, in other words, ought not the value thereof to be fairly estimated, and deducted from the whole fee, and a third of the residue only be paid over to him?

And if one partner engages in other business, and neglects and abandons that of the firm, or if he dies, and in either case his partners have to manage the business alone, paying their own expenses of living and the varied expenses of their families out of their shares of the earnings, ought the useless partner, or the heir of the dead one, to receive a full third of the earnings, without deduction of these expenses?

Take the case of one partner dying. The survivors may have no other business than that of the firm. It may require all their time, tax all their energies. They may wish to close it up and retire from business, or engage in some other enterprise, and will take no new cases. The heir, whom we will suppose to be, as he may be, a man, is not compelled to devote a moment of *his* time to the business, or to bestow a moment's labor on it. He may follow another occupation, and by that earn his living or accumulate wealth. Or, the executor may represent creditors only, who of course bear none of the burdens of the business.

It is supposed, of course, that the difference between a third and a fourth of the fees, in cases not nearly finished, was estimated by the parties to be a sufficient compensation to any two who might survive the third, for their continued attention to the business, and for all alimony for themselves and their families, while so employed. That difference is one-twelfth, or for each one twenty-fourth part. However inadequate, it must of course content the appellants, if they contracted so, and if the contract was still in being and vigor at the time of Mr. Hughes' death,

not forfeited nor abrogated, and with unimpaired right to full enforcement of it.

And if the Court had rejected the supposed contract, and held that in the absence of any special contract, the estate of a partner would have been entitled to an equal share of all fees collected after his death, it might have added "*impensis deductis*, of course; and as all these parties thought that to reduce the share of one deceased to a fourth would sufficiently remunerate the others for their labor and their expenses of living, we will accept their concurrent judgment, and decree the fourth;" and there would have been no reason to complain of this, if the rights of the deceased, under the partnership articles, had not been forfeited or lessened before his death; and if the Court *could* decree settlement in that manner, and virtually continue the partnership until it should die of exhaustion, by the ending of all joint business.

The expenses of living of each partner are $6,000 per annum. If this is to be deducted as expenses of management of the business, the executor would contribute $2,000 per annum to each; and to pay this with one-twenty-fourth of the fees received, would require receipt of fees by them, during the year, to the amount of $48,000. And this twenty-fourth part, greater or smaller, is *also* to compensate each survivor for his labor, time and service, intellectual and physical, for the benefit of the executor, during the same year.

Is it possible that, in the absence of a special contract, these survivors must devote all their time and all their labor, for years, to this business of the dissolved firm, for the joint benefit of themselves and of the heir or creditors, and pay over to one or the other a full third or fourth of all the earnings, deducting nothing, or a sum utterly inadequate, for expenses of living of themselves and of their families? The proposition is absurd. A case put may the better illustrate this.

Clearly, the executor or heir has no right to demand that

the survivors shall *not* confine themselves to the remaining business of the firm, but *shall* accept new business that shall contribute towards their expenses of living.

Let us suppose this case, then: a law firm of three members has six cases, in all of which the fees are wholly contingent on success, and each is to be $1,500. One partner dies, after which one whole year is occupied in conducting them, the survivors having no other business, and the family and other necessary and reasonable expenditures of each being, for that year, $3,000. At the end of the year, the heir or executor claims, and they pay him, one full third of the fees received; he receives $3,000, and they retain, each, the same sum. They, thus, have nothing over their expenditure for their year's labor. The heir has been at liberty to earn, by labor in some vocation, all he needed to expend, or more; and the $3,000 is to him all clear gain. And yet, *nulli sunt fructus, nisi impensis deductis.*

If the executor receives, on the same hypothesis, one-fourth, this is $2,250, leaving for each *working* partner $3,375; and the gains of each, over expenses, would be, for the year, $375.

But now suppose, that of the six cases, they lose three. The receipts, then, are $4,500. He takes $1,500, leaving each of them the same. His $1,500 is clear gain. But each of the survivors has expended $1,500 more than he receives, and thus has lost $1,500 by the business. Did not justice require that their expenses of living should be deducted from the money received before a division? and that if the business cost more than it returned, there would be nothing left to divide?

If he received a fourth, this would be $1,125, leaving for each survivor $1,687.50; the loss on the year's work being $1,312.50.

If we suppose the income per annum $30,000, and expenses of living $6,000, the executor, receiving a third, would have $10,000; receiving a fourth, $7,500. In the

former case each working partner would have $10,000, in the latter $11,250; gain or savings over expenses, in one case, $4,000; in the other, $5,250; to the executor's clear gain, $10,000, or $7,500.

Thus, on any hypothesis as to annual amount of earnings, there must be gross inequality and injustice, sometimes greater, sometimes less, but always injustice, on the principles of this decree, in favor of the heir or executor who *does* nothing, *expends* nothing, *risks* nothing, against those who *do* all, *expend* all, and *risk* all.

Alterâ manu fert lapidem, panem ostentat alterâ. "Work for me, servants," the executor may say, "and divide your earnings with me! or abandon all, and lose your means of living, if the collar galls you. *Sic jubent judices.*"

Nihil est detestabilius dedecore, nihil fœdius se vitute. Ad decus et libertatem nati sumus; Cicero said to the Romans, in an oration against Philip. To condemn one to work during long years, for the estate of an enemy, is to condemn him to dishonor and servitude, and cruel and inhuman.

What we claim, therefore, is, that when the court below had decreed to the executor one third or one fourth, as the case might be, of all fees received and not theretofore divided, this decree could be made not unjust and unreasonable and oppressive, only by allowing the deduction, before division, of the reasonable expenses of the survivors and their families, since the death of Mr. Hughes; or if they have had other business, of the due proportion of such expenses, according to the relative values of the old and new business.

And that, under the circumstances in proof, the estate of the deceased partner should be made to bear its due share and proportion of the value of the time and labor expended, and of the expense incurred, by his partner or partners, in the cases lost before the British and American Commission.

Non est ferendus, the Code of Justinian says, (single Law

§ 4 *de caducis tollentibus;* vi. 50) *is qui lucrum quidem amplectitur, onus tamen ei annexum contemnit.*

Another class of the exceptions presents the question whether the estate of Hughes should be charged for fees lost to the firm by his neglect, mismanagement or misconduct.

By admissions made to Thomas Hunton, he enabled him to extort from the firm the sum of $4,500 in the Laplante case.

By his neglect the firm lost the fees that would have been paid in the cases of Charles H. Adams and Susan A. Shelby.

The case of McDonald and Fuller he placed in the hands of another firm, to be managed. Some $68,000 was collected, on which the firm of Hughes, Denver and Peck should have had 10 per cent. Mr. Hughes, having taken charge of the case, collected *nothing* for the firm; Mr. Fuller held his note for $2,000, and would not pay it, and never did pay it, because, as Hughes stated to one witness, Fuller owed *him* more than that sum; or as he stated to another (*for it was explicitly agreed that General Sanborn need not be waited for, and that what was given as his statement should be considered as testified by him,*) as he stated to General Sanborn, Fuller owed *the firm* more than the amount of his note. He avoided payment of it in this way, until suit on it was barred by limitation, and it remains unpaid.

We contend that the loss of the whole fee is chargeable to the neglect of Mr. Hughes; and that, at any rate, he justly owes to the firm the amount of the note; because he *gained* that amount by using the firm-claim against the note.

It makes no difference that the set-off claimed by him was not effected by extinguishment or surrender of his note. The case of Fuller and McDonald was wholly in his hands. He employed the other counsel who were paid. The fee to the firm was not affected by that. It was his special busi-

ness to collect that fee. He appropriated two thousand dollars and more of it to his own use, by claiming that he did not owe the note, and thus using so much of what was due the firm toward paying his note, instead of collecting it. The firm lost so much by this action of his, and he made so much, for the note remained unpaid until limitation had paid it for him. He said that he would not plead limitation, in 1873; but that did not constitute any bar to his pleading it.

He could not legally set-off against a note given to Fuller, a debt due to the firm by Fuller and McDonald. A debt to the firm was not a debt to him alone. Therefore he could not claim a right to off-set it, until he made it a debt to himself, by settling so much with the firm.

But it makes no difference whether he did set it off or could set it off. He took so much of what was due the firm, used it to avoid paying his note, disenabled himself to collect it in cash for the firm, and prevented Fuller paying it to the firm. To claim that he had paid his note with it was to prohibit Fuller paying it to the firm, by asserting that it was extinguished by being set-off against the note. And he has had the benefit of it. He has virtually paid his note with it. He has claimed for it that effect, and no suit has been brought on the note, nor can any be brought now which will not be defeated by the plea of limitation.

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§ 6.

THE LAMAR AND MARTIN CASES.

The claim of the estate of Hughes to an interest in the fee paid Denver and Peck in these cases stands upon a totally different footing from the claim as to other fees; and when we submitted the controversy to arbitration, we excluded them from the consideration of the arbitrators, not considering the executor's claim to a portion of the fees to

be entitled to the least respect; and, in effect, not supposing that he sincerely believed that he had any plausible claim at all.

The claim of Gazaway B. Lamar was in the hands of the firm before the dissolution. It was for a very large amount, and success considered very doubtful. It was managed by Mr. Peck, Mr. Hughes attending to it at one term and moving for leave to amend the petition, which obtained, he left the amendment to be made by Mr. Peck.

Lamar had employed the firm to attend to his case, for a contingent fee, the amount of which, it is in evidence, was not settled. The firm wished it to be settled at 20 per cent.; but Lamar was not willing to pay even 15. After most of the work had been done, with this indefinite arrangement, Hughes and Lamar quarrelled, and Hughes withdrew from the case as attorney, by motion filed and allowed. On presenting the motion to Judge Peck for approval, he denounced Lamar as a rascal and his claim as fraudulent, to that Judge, and, replying to something asked about the fee, said that he would have nothing more to do with the case in any way; that he would not be tainted by any connection with it, or by receiving fees in it.

He never *did* afterwards take any interest in it or pay any attention to it. Of course, the fee being wholly contingent, he could only have an interest in it by attending to it to the end; and his estate has no more right to claim anything for his services, if he had rendered any, than it would have if he had been employed alone, had abandoned the claim and denounced it and the claimant, and the latter had employed other and new counsel. The client, where the fee is wholly contingent, is bound to pay, only in the event of success, and success obtained by the efforts of the particular counsel. If one so employed abandons the case before success is attained, he abandons all claim to compensation for services already rendered.

After he abandoned it, the firm of Hughes, Denver and

Peck had nothing to do with it. It was no longer counsel in the case, because Hughes was not.

And, in point of fact, Denver and Peck went on to attend to it individually, after Hughes had done all he could do to destroy it. What he had done was all the more effective and injurious, because, having been of counsel in it, the judge to whom he denounced it must of course have attached some weight to his denunciations.

After so denouncing the claim, it would have been monstrous in Hughes to set up a claim to compensation for services already rendered, in a case declared by him fraudulent; and more so to claim part of what other men afterwards earned or had earned before. There are some things that men cannot do without dishonor.

Several things that are to be lamented have in these later days come to pass in the domain of jurisprudence. One is, that *honor*, which is the highest degree of morality, is not recognized as creating any legal obligation. And another is, that *demonstration* of truth has almost entirely permitted argumentation to usurp its place, so that no one can safely rely upon a logical demonstration. No one can safely conclude that any proposition is established beyond possibility of disrespect. The Roman jurists seldom erred in their brief and succinct demonstrations; and they were not compelled to doubt whether what was demonstrated would be accepted as true.

When Mr. Hughes, in a case in which the counsel were not to be paid *pro relatione laboris*, but a contingent fee, or large sum for *the whole* service in case of success, nothing in case of failure, withdrew from the case, he ceased to be counsel in it, and if the *firm* continued to be of counsel, he ceased, *pro hoc casu*, to be a member of the firm. Denouncing the client as a rascal and the claim as fraudulent, as one connection wherewith would taint and dishonor him; leaving his partners to attend to it without aid from him, *he could retain no claim* against the client for an aliquot part

of compensation to the firm for services rendered prior to his withdrawal; for the fee was indivisible, and no act of man could divide it, with reference either to fractions of time or quantities of labor.

The withdrawing partner became at once a total stranger to the case. Those who continued to attend to it could charge nothing for *his* services *prior* to the withdrawal, because, if he had any claim on that score, it was personal to himself, as against the client; nor for services that he did *not* render, subsequent to his withdrawal. They could receive nothing from the client for him; and therefore he could claim nothing of what they might receive.

But it is even more conclusive, that, denouncing the claim as fraudulent, Mr. Hughes could not demand pay for services rendered in attempting to extract payment of it from the suffering Treasury of the United States. He could not, while so denouncing it, and with virtuous indignation declining to be tainted by contact with it; and especially disdaining to smut his fingers in anticipation with any interest in a fee contingent on the success of its rascality,—he could not decently put out an anchor to windward, or hedge, by a private declaration in writing, not made known to his former clients or deserted partners, that he reserved the right to claim an equal interest or any interest in the fee, in case of success, notwithstanding his attempt to defeat it.

It is strange, in the face of so cogent a demonstration, that a court, without a reply to it by counsel, and without assignment of any reasons at all by itself, should deliberately decree to the executor of the withdrawing partner's will, one full third of the *whole* fee collected by the others, under *any* circumstances, and especially when its amount had been fixed, after his withdrawal, by agreement made with the other partners; when they had no right to demand anything from the client, for *his* services, and if they *had* done it would have taken very little by their motion.

The court below could decree in favor of the complain-

ant in the matter of the Lamar claim, only by attributing to Mr. Hughes the cunning instincts of a sordid and rapacious dishonesty; for they had to believe, in order to decide so, what the jealous guardian of the honor of Mr. Hughes claimed, that at the moment when he was publicly abandoning the case, as one tainted with fraud, and disclaiming interest in the fee, and violently denouncing the claim as dishonest and his client as a rascal,—*at the same moment* he was carefully putting away for safe keeping a private memorandum, made known only to his confidant, kept a secret from the partners, to whom be abandoned the case, which he might use profitably in case of the success of the claim; but, in case of its defeat, to remain forever unknown.

Denver and Peck were not paid for anything done by Hughes. They subsequently contracted with Lamar for a fee of ten per cent., contingent, for their own services alone. They have collected and received nothing from Lamar or Martin, on account of Hughes or for his services.

Hughes *could* not withdraw from the case as counsel, and still retain an interest in the fee. Could he have claimed anything of Lamar? Such a claim would have been dishonest and shameful. The fee that Denver and Peck received was not earned by the firm, because that consisted of *Hughes*, Denver and Peck, and Hughes withdrew from the case and refused his services and ceased to be counsel. He did not cease to be so, individually, as James Hughes, and continue to be so as James Hughes, one of the firm. And if the *firm* was no longer of counsel, because *he* was not, then he could have no claim to share the fee. He had none individually, he had as little as a member of the firm; and if he could have, by hook or crook, got possession of any part of it, he would have had no more right to it than if he had stolen it.

He prepared the draught of a motion to effect his withdrawal from the case, with a reservation of the respective

rights of each partner, to compensation for services rendered; but he did not use it. He filed a simple motion to be permitted to withdraw; seeing, no doubt, the utter absurdity of abandoning a case, refusing to render further service, and at the same time registering an individual claim for payment for services already rendered.

But he laid the draught away, and kept it, and had a memorandum made upon the diary of James Hughes & Co., after the judgment was rendered, that he still claimed an interest in the fee. If he intended to use the draught and memorandum as they have been used, to sustain a claim for a third of the fee, not of the firm, but of Denver and Peck, with whom and for whose services alone its amount was agreed on long afterwards, his worst enemy while he lived need not do more after his death, to have revenge for all fancied or real wrongs, than to tell the simple fact. It could not be made worse by any words of bitter comment. The executor of his will makes this case for him. If he could succeed by it in winning a sum of money for his estate, it would be money gained at a great cost. The attempt to do it does not well comport with a sensitive tenderness of regard for the reputation of his testator.

Certainly Hughes had the *power* to withdraw from the case. That he was or had been a partner did not incapacitate him to do *that*. He could not be *compelled* to continue to attend to a fraudulent claim, for a scoundrel.

And after he had done so, he could not be entitled, in any way in the world, to any compensation. If he *meant* to claim it, he never did. And the claim in behalf of his estate is utterly without merit.

But the court below decreed to the executor one-third of the fee of 10 per cent., which Lamar, after the withdrawal of Hughes, had agreed to pay *them*, not for themselves and Hughes, but for themselves alone. It would have been the merest folly to ask a man, treated as Lamar had been, to pay five per cent. of the claim to them for a man who had

libelled him and his claim, and done his best to defeat it. No man not a born idiot would have ventured to propose it to him. Mr. Hughes had announced his intention to assert his *individual* right to compensation against Lamar; and if he *had* any right to compensation, he should have done so.

When the Court decreed that the fee of 10 per cent. belonged to *the firm*, it was settled, for the case in that court, that by the withdrawal of Hughes the *firm* had lost precisely what above 10 per cent. would have been demanded and paid if he had continued in it. The firm, or Messrs. Denver and Peck, always demanded 15 per cent., and meant to accept no less, and thus the withdrawal cost the firm (according to the decree) five per cent. This the estate of Hughes owes the firm, if it can claim one-third of the 10 per cent. paid.

This demonstrates, as it was meant to demonstrate, the grave error committed in deciding that Hughes retained an interest in the fee. Logic is inexorable. Lamar owed Hughes nothing. Whether as an individual or as a member of the firm, he gave up all claim against him when he abandoned and denounced his case. Then Denver and Peck *could* not demand of Lamar *anything* for *his* services. They *did* not. They accepted 10 per cent. for their own services, leaving Hughes to enforce any claim he might have against Lamar.

There are cases in which soft phrases and affectation of distrust of one's opinion, even as to a judicial decision, are entirely inappropriate. This is one of them. It is not possible to find a single ground on which to defend the decree as to this particular fee.

The executor makes no attempt at all to show any good cause or reason for the abandonment of the case of his testator. There was a quarrel between him and Lamar; and, so far as we know from the proof anything about it, the fault was on the side of Mr. Hughes. It would seem to

have been advisable for the executor to show that he had *some* decent cause for withdrawing from the case to the injury of his partners; but *no* cause could excuse his denunciation of the case, *for to denounce it and Lamar as he did, was to denounce his own associates as being accessories to and furtherers of a fraud.*

It may be that in some age of the world there have been precedents for such a decree in such a case. If, indeed, *nullum est jam dictum quod non dictum sit prius*, the precedents for it should be extracted from the crypts of antiquity, in which they lie mouldering, that they may share with this portion of the decree the admiration of posterity, and teach the professors of law how they should deal with partners and clients, to win the right to compel the one to pay and the others to share with them fees that they declared would taint them, paid in cases denounced by them as dishonest, by persons rejected by them as clients and stigmatized as rascals.

Publicly to proclaim that a case is corrupt, and that a fee for service in it, paid in case of success, will be paid by a rascal and soil the hand that takes it, and at the same time, by private memorandum, not known to any one interested, to declare a purpose to assert a right to part of it if it should be paid, and to prop up this claim by a subsequent entry in a private diary, was a device that a zealous regard for the good fame of the doer would carefully have committed to oblivion. *Aliud clausum] in pectore, aliud in linguâ promptum habebat*, are ill words to engrave on the tombstone of a friend.

We thus submit to the Court our whole thoughts on the questions that this case presents. It is a case in which the interests of the parties are as nothing in comparison with the importance of the principles. It concerns a multitude of others as much as it does these parties. It is to settle the law for all partnerships of labor, intellectual and physical; and everywhere these are now found.

It is also a case which is to be decided by no other authority than that of justice and reason, only very partially uttered, as yet, by the tribunals of justice. And it is a case in which it is essentially necessary not to leave the straight and narrow way where exact logic leads, tempted by fanciful analogies or plausible theories applicable to other kinds of partnerships. If *we* have sometimes gone astray, the difficulty of the subject must be our excuse.

The sum of all is, that this action, like every one which seeks a settlement of partnership accounts, is an action *bonâ fide*, and that the Court must take care never to reward ill faith, enrich negligence at the expense of those who have labored, and make it profitable for one to have deserved ill of his partners. What one hath earned, that and no more, if possible, he should have. To prevent disputes and doubtful controversies, every such partnership should be advised to provide, in uniting, for the settlement of its affairs; and then it should be given each partner to understand that if he would have those who succeed him when he dies reap the benefit of that agreement and arrangement, he must entitle them to it by the utmost fidelity to the obligations of fraternity, by good faith, and by bearing, in all respects, his fair share of the labors and burdens of the firm; or he may forfeit all, and be deemed to have repudiated the agreement.

This the decree in this case does not do. It does precisely and with extraordinary vigor the reverse.

ALBERT PIKE,
ROBERT W. JOHNSON,
L. H. PIKE,
Of Counsel for the Appellants.

IN THE

Supreme Court of the United States.

No. 240.

JAMES W. DENVER AND CHARLES F. PECK,
APPELLANTS,

vs.

ARCHIBALD ROANE, EXECUTOR OF JAMES HUGHES, DEC'D.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF OF S. S. HENKLE, of Counsel for Appellee.

WM. H. MOORE, PRINTER, WASHINGTON.

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BRIEF OF S. S. HENKLE, of Counsel for Appellee.

The bill in this case was filed by the appellee against the defendants as surviving partners of the late firm of Hughes, Denver & Peck, for account and settlement of the partnership.

The firm of Hughes, Denver & Peck was formed for the practice of law, in the city of Washington, in the year 1865. They almost immediately entered upon a large and lucrative practice, chiefly in the Departments, Court of Claims and this Court. The firm continued until March, 1869, when it was dissolved by mutual consent. The written agreement of dissolution is found on p. 5 of Record.

This stipulated that "the business of the firm heretofore received, and now in hand, shall be closed up as rapidly as possible by the members of the firm, *as partners*, under their original terms of association, and in their firm name." By the terms of the original partnership each

partner was equal. Subsequently, in the month of August, 1869, the further agreement in writing was entered into by the members of the late firm, found on p. 6 of the Record.

This agreement seems to have been made in contemplation of the death of one or more of them before the partnership business should be finally wound up. It provides "that in case of the death of any one of us, his heirs or representatives, or their duly authorized agent, shall receive one-third of the fees in cases nearly finished, and twenty-five per cent. in other partnership cases."

Judge Hughes died October 21, 1873, and the complainant alleges that the defendants have received large sums of money from the business of the late firm in certain cases, particularly designated in the bill, of which he as executor is entitled to one-third as "fees in cases nearly finished" at the time of the death of Judge Hughes; and that there is a large amount of undisposed of business in which he will be entitled either to one-third or one-fourth under the agreement of August, 1869.

The defendants admit the receipts of the fees as charged in the bill, but deny that Judge Hughes or his executor is entitled to the one-third or the fourth of the fees in controversy. They claim that Judge Hughes neglected the business, did not do his share of the work, and if he was entitled to anything it was only a reasonable amount for the work he did in the cases before the dissolution of the partnership. That he quarreled with Gen. Denver, and thereby made their harmonious co-operation impossible, &c. See p. 20 of Record, answer of Denver, and p. —, answer of Peck.

They claim also that the agreement of August, 1869, was conditioned upon each party's doing his share of the work, and that as Hughes failed in this, the agreement was void.

I believe, eliminating the asperities found in the answers of the defendants, this is a fair statement of the case as made in the pleadings.

The case of Lamar and Martin stands upon facts peculiar to itself, and I will treat of that hereafter.

After the issue was made up, the whole controversy, except as to the Lamar and Martin case, was by the agreement of the parties referred to arbitration. The Lamar and Martin case being reserved for adjudication by the Court. A volume of testimony was taken before the arbitrators. On the part of the complainant the testimony went to establish his *prima facie* case. On the part of the defendants, to prove the defences set up by them, viz: That Judge Hughes from a short time after the formation of the partnership until the dissolution in March, 1869, and from thence down to his death, failed to do his share of the work,—that in 1872 he quarreled with Gen. Denver, and thereby rendered their harmonious co-operation impossible,—that without express arrangement Judge Hughes had assumed the management of the business in the Supreme Court, Gen. Denver the Department business, and Mr. Peck the business in the Court of Claims,—that their large earnings were in the Court of Claims, and that for a short while after the formation of the partnership Judge Hughes assisted Mr. Peck in that Court, but the latter gradually assumed the almost exclusive management of that branch of the business, and continued it down to his sickness in the winter of 1872, when Gen. Denver took principal charge of it until Mr. Peck returned to it a few months later, and that since then General Denver has assisted him more or less. Gen. Denver also testified that he had performed a large amount of labor in cases before the British and American Commission, every one of which was lost, and he claimed that a large allowance should be made him and Mr. Peck as against Judge Hughes' estate for this labor. The testimony also shows that in 1872, while Mr. Peck was in Europe, Gen. Denver and Judge Hughes quarreled, and would afterwards have nothing to do with each other, and Gen. Denver blames Judge Hughes, who would probably, if alive,

partner was equal. Subsequently, in the month of August, 1869, the further agreement in writing was entered into by the members of the late firm, found on p. 6 of the Record.

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Judge Hughes died October 21, 1873, and the complainant alleges that the defendants have received large sums of money from the business of the late firm in certain cases, particularly designated in the bill, of which he as executor is entitled to one-third as "fees in cases nearly finished" at the time of the death of Judge Hughes; and that there is a large amount of undisposed of business in which he will be entitled either to one-third or one-fourth under the agreement of August, 1869.

The defendants admit the receipts of the fees as charged in the bill, but deny that Judge Hughes or his executor is entitled to the one-third or the fourth of the fees in controversy. They claim that Judge Hughes neglected the business, did not do his share of the work, and if he was entitled to anything it was only a reasonable amount for the work he did in the cases before the dissolution of the partnership. That he quarreled with Gen. Denver, and thereby made their harmonious co-operation impossible, &c. See p. 20 of Record, answer of Denver, and p. —, answer of Peck.

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I believe, eliminating the asperities found in the answers of the defendants, this is a fair statement of the case as made in the pleadings.

The case of Lamar and Martin stands upon facts peculiar to itself, and I will treat of that hereafter.

After the issue was made up, the whole controversy, except as to the Lamar and Martin case, was by the agreement of the parties referred to arbitration. The Lamar and Martin case being reserved for adjudication by the Court. A volume of testimony was taken before the arbitrators. On the part of the complainant the testimony went to establish his *prima facie* case. On the part of the defendants, to prove the defences set up by them, viz: That Judge Hughes from a short time after the formation of the partnership until the dissolution in March, 1869, and from thence down to his death, failed to do his share of the work,—that in 1872 he quarreled with Gen. Denver, and thereby rendered their harmonious co-operation impossible,—that without express arrangement Judge Hughes had assumed the management of the business in the Supreme Court, Gen. Denver the Department business, and Mr. Peck the business in the Court of Claims,—that their large earnings were in the Court of Claims, and that for a short while after the formation of the partnership Judge Hughes assisted Mr. Peck in that Court, but the latter gradually assumed the almost exclusive management of that branch of the business, and continued it down to his sickness in the winter of 1872, when Gen. Denver took principal charge of it until Mr. Peck returned to it a few months later, and that since then General Denver has assisted him more or less. Gen. Denver also testified that he had performed a large amount of labor in cases before the British and American Commission, every one of which was lost, and he claimed that a large allowance should be made him and Mr. Peck as against Judge Hughes' estate for this labor. The testimony also shows that in 1872, while Mr. Peck was in Europe, Gen. Denver and Judge Hughes quarreled, and would afterwards have nothing to do with each other, and Gen. Denver blames Judge Hughes, who would probably, if alive,

blame Gen. Denver, as he certainly did while living. For these reasons the defendants claim that Judge Hughes forfeited his right to any part of the earnings of the firm.

The testimony shows, that after the dissolution Judge Hughes gave about the same attention to firm business that he did before, down to 1872; and the complainant shows by evidence of his physician that through 1872 and down to his death he was unfit to do business on account of sickness; and we claim that the evidence does not show that he failed to attend to his peculiar branch of the business, viz: the cases in this Court, at any time.

This evidence was not offered on the part of the complainant, because he supposed it necessary to the establishment of his legal rights, but for the purpose of repelling the imputation that Judge Hughes had purposely and wilfully disregarded his obligations to his partners to contribute his share of labor to the common business.

As we have seen by the agreement of dissolution of March 18, 1869, the business was to be "closed up as rapidly as possible by the members of the firm *as partners*, under their original terms of association and in the firm name."

Under this agreement each partner was entitled to one-third of the earnings of the firm, and of each individual member of the firm, in the partnership business.

There is no stipulation that any member of the firm should do any particular work, or any given amount of work, or that any member should be paid more than his equal share on account of over-work, or that the share of any member should be reduced on account of under-work.

Of course it would be the duty of each member of the firm to give such personal attention and service as he was capable of, and the business should require, and especially such as he had been in the habit of giving before the dissolution, but the *agreement* does not provide that the doing so, shall entitle him to more, nor the failure to do so, to less, nor does the law.

Collyer on Partnerships (Perkins' Ed.) sec. 183.—"As it is the duty of each partner to devote himself to the interests of the concern, to exercise due diligence and skill for the promotion of the common benefit of the partnership, it follows *that he must do it without any reward or compensation unless there is an express stipulation to that effect—and there is no difference in this respect, though the duties performed by the partners have been very unequal in value and amount.* The reason is that each partner taking care of the partnership business, is in fact taking care of his own interests and is performing his own duties and obligations, and his personal skill, ability and diligence in so doing constitute a part of the consideration upon which the partners have entered into the partnership; *and the law never undertakes to measure and to settle between the partners their various and unequal services bestowed on the joint business.*"

Story on Partnerships, sec. 182.—"As there is an implied obligation in every partner to exercise due diligence and skill, and to devote his services and labors for the promotion of the common benefit of the concern, it hence follows *that he must do it without any reward or compensation, unless indeed it is expressly stipulated for between the partners, as it well may be under peculiar circumstances.* The reason is that each partner in taking care of the joint property, is in fact taking care of his own interest, and is performing his own duties and obligations implied in and constituting a part of the consideration for the others to engage in the partnership; and the law never undertakes to measure and settle between the partners the relative value of their various and unequal services bestowed in the joint business, for the obvious reason that it is impossible to see how far in the original estimate of the parties, when the connection was formed, the relative experience, skill, ability, or even the known character and reputation of each, entered as ingredients into the adjustment of the terms thereof."

Ibid. sec. 185. "If any allowance is intended to be made

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Ibid. sec. 185. "If any allowance is intended to be made

for extra services or labor, it is a fit matter to be adjusted in the articles under which the partnership is formed."

Ibid. sec. 331. "So fixed is this duty still to continue to act for the benefit of the partnership, that no partner is allowed to claim any particular reward or compensation for his trouble or service, in thus assisting in the arrangement and winding up of the concerns thereof, unless it be specially stipulated."

Thornton vs. Proctor, 1 Anstruther, 94.—"The plaintiff and defendant were equal partners in the wine trade in 1781. At that time they both lived in the house where the business was carried on, but at the end of nine months the defendant went to reside in another house, and continued to do so until the dissolution in 1790. After the removal of the defendant, the plaintiff managed the whole business, and was at considerable expense in treating customers, which was found necessary in that trade. The plaintiff claimed ten pounds a year for this expense. The master allowed it, but the Court held that in the absence of a stipulation for such allowance by the parties, he was not entitled."

Franklin vs. Robinson, 1 John. Chy., 157. The Court say: "The parties to the contract were joint owners of the ship and cargo, and the defendant, W. S. Robinson, in his character of part owner, was not entitled to charge for his services except upon the ground of special agreement. I know of no case which entitles one partner to such an allowance against another without an agreement. The case of Thornton vs. Proctor (1 Anst., 94) evidently proceeds upon this principle. Each joint owner, in taking care of the joint property, is taking care of his own interest, and the law never undertakes to measure and settle between partners their various and unequal services bestowed in the joint business. This must be left to be regulated by contract."

Bradford vs. Kimberly and Brace, 3 John. Chy., 431.—The Court say: "In the case of joint partners, the general

rule is that one is not entitled to charge against another a compensation for his more valuable services, bestowed in the common concern without a special agreement. This is deemed a case of voluntary management."

Caldwell vs. Leibers, 7 Paige, 483, Syllabus:—"Partners are not entitled to charge each other, or the firm of which they are members, for their services in the care and management of the business of the copartnership, unless there is a special agreement to that effect, or where such an agreement can be implied from the course of business between the partners. In the management of the copartnership business, each partner is attending to his own interest therein, as well as the interest of his copartner; and the law implies no agreement to compensate either of them for their various and unequal duties and services in the management of the business of the firm."

Hutcheson vs. Smith, Same vs. Sumasnon, 5 Irish, Eq., 117:—"The managing partner of a concern is not entitled to an allowance for carrying on the partnership trade, where there is neither contract between the parties, nor a custom of the trade to authorize such allowance."

Bevens vs. Sullivan et al., 4 Gill., 383.—Bill for account and settlement between parties and for allowance of extra compensation for use of carryall and horse belonging to complainant used by partnership. The work was all done by the complainant. The Court say: "For personal services rendered by a partner, no compensation can be claimed without proof of an express agreement, that he should be compensated for them."

Philips vs. Turner, 2 Dev. and Bat. Eq., 123.—The case came up on exceptions to the Master's report, says the Court: "The first exception is, for that the Master hath allowed to Philips the sum of five hundred dollars annually for his personal services to the firm. The Master states that there was no evidence before him of any special agreement between the parties that Philips should receive a compensation for the care and management of the joint

property; but that this allowance appeared to him proper, inasmuch as the business of the firm was almost exclusively under the personal superintendence of Philips. We take the rule to be perfectly established that without a special agreement partners are not entitled to charge each other for such services. The only exception that we are aware of, if indeed it can be called an exception, is where a partner is appointed an agent for a *special purpose*, in which case he may be entitled as against the firm to the usual compensation in relation to the subject of such agency. It is not unusual for partnership associations to be formed upon the very basis that one is to contribute his credit and the other his personal services to the success of the undertaking. This exception is allowed."

Lee vs. Lashbrooke and Lashbrooke vs. Lee, 8 Dana, 214; Burden vs. Burden, 1 Ve. and B., 168; Whittle vs. McFarlane, 1 Knapp, 341; Lewis vs. Moffit, 11 Ill., 392; King vs. Hamilton, 16 Ill., 190; Coursen vs. Hamlin, 2 Duer, 513; Justin Lyman vs. Ellis Lyman et al., 2 Paine C. C., 11; Levi vs. Harrick, 18 Iowa, 344.

A surviving partner is not entitled to compensation for carrying on and winding up the partnership business:

Patton's Ex. vs. Calhoun's Ex., 4 Gratt., 138.—Calhoun and Patton were partners in merchandising. Calhoun died and Patton carried on the business eight months after. His executor claimed compensation. The Court held he was not entitled.

Peper vs. Smith et al., 1 Head (Tenn.,) 93.—By the Court: "Whatever may be thought of the justice of the rule where the services of the members of the firm are unequal, there is certainly nothing better settled, than that such a claim cannot be made without an express stipulation to that effect. The law does not undertake to measure between the partners the relative value of their services severally bestowed upon the joint business without an express contract.

Though the rule may seem still harder in the case of the surviving partner, yet it is the same; he can have no compensation for trouble or services for settling up the business unless the same be stipulated."

It was argued in the court below that the principle governing mercantile or manufacturing or trading partnerships did not apply to a firm of lawyers. That they were but an association of co-workers, and when one died his capital was withdrawn and he had no further interest in the joint work or business.

It is conceded that the death of a member will dissolve a firm of lawyers, as well as any other partnership, unless it be stipulated that it shall not, but it does not extinguish the interest of the deceased member in the business acquired before his death, any more than it would if it were a mercantile or manufacturing firm. The dead lawyer's estate would have no interest in business acquired after his death, but in all business commenced before, his interest would continue until its completion, just as though he had remained in full life.

It was also contended below that whenever a member of a law firm failed to do his share of the joint work, he forfeited his interest in the earnings of the other members of the firm in the partnership business, or if he had any interest at all, it was proportionate to the amount of work he did.

Upon principle I am unable to distinguish between a firm of lawyers and a firm of traders, and so far as I have been able to find authorities, it has been held that they are not distinguishable. To the credit of our profession be it said that the books furnish but few cases of controversies between lawyers as to their fees.

Webster vs. Bray, 7 Hare, 159.—The plaintiff and defendant were attorneys and were jointly appointed solicitors for a Railway Company. They were not otherwise connected and resided in different places. The defendant

had collected a much larger sum from the company than the plaintiff, who filed his Bill for an account and equal division of what had been received from their common employer, claiming that *quoad hoc* they were partners. The defendant denied the partnership, and the fact was that he had done much the larger part of the business. The Court found that they were partners in this employment, and that the plaintiff was entitled to an equal division, subject to a certain per cent. which they found the plaintiff had agreed to allow the defendant.

Robinson vs. Anderson, 20 Beavens, 98.—The market place at Easingwold sued two persons for non-payment of tolls and stallage, whereupon they and other inhabitants agreed to bear the expense of defending; and they appointed a committee to communicate with an attorney for that purpose. The committee retained the plaintiff. Afterwards, on the 15th of June, 1838, in consequence of the relationship of the plaintiff to some of the joint owners of the market place, he proposed that some other attorney should be retained jointly with him, and thereupon the defendant was appointed and he was informed of the retainer, and all that had been done, and consented to act jointly with the plaintiff and divide profits equally.

In the latter part of 1845, the plaintiff being unwilling to lay out more money, communicated with the defendant, and offered to relinquish all further participation, if paid his costs out of pocket. The defendant not agreeing to this, the plaintiff on the 22d day of January, 1846, communicated the correspondence to the committee, and expressed himself as hopeless of a favorable issue, and thereupon they resolved that the defendant should proceed himself. Ultimately, and on the 9th day of February, 1848, the parties to the actions agreed that they should be stopped, that the defendants should have judgment, and that the parties should pay their own costs.

The defendant delivered a separate bill of costs amounting to £1,055. The plaintiff afterwards demanded an equal

division with the defendant, who refusing to divide, the plaintiff brought his bill.

The master of the rolls decreed an equal division. In his opinion he said "one could not say to the other 'I have done more business than you have, and am therefore entitled to a larger share of profits.'"

The contract of dissolution of March 18, 1869, did not in any way change the legal or equitable relations of the partners to each other as to the unfinished business, for that was to be closed up by them *as partners and in the firm name, under the terms of original association.* Under both the partners were equal, and, as we have shown, by law entitled to an equal division of the profits of the business of the firm and of each member of it, in the partnership business; and that absolutely and without reference to the *equality or inequality of their respective labors.*

But in August, 1869, another agreement was made by the late partners, by which the principle of division was somewhat changed. It was therein stipulated that in case of the death of any one of the partners his estate should receive *one-third* of the fees "in cases nearly finished," and *twenty-five per cent.* in other partnership cases.

It was argued in the court below that this was not a contract, but a proposition addressed by letter by Judge Hughes to General Denver, to which Mr. Peck had assented, but it also required the assent of General Denver; that *his assent contained a condition* the acceptance of which by the other parties was necessary to its completion as a contract; that there was no evidence of the acceptance of the condition, and hence no contract. (See p. 11 of Record.)

What is called the condition was in these words: "I agree to this, but with the express understanding that all the *partnership obligations* shall be first satisfied before any such division can be made at any time." This was no condition, but simply an assertion of the construction which the law would have given to the proposition itself, inde-

pendently of any such expression, and it required no further notice or action on the part of Judge Hughes or Mr. Peck to make it binding upon the parties.

Mr. Peck testifies that when he had gone to Europe on account of ill health in 1872 he considered that in case of his death this contract would fix the rights of his estate in the partnership business. (See Record, p. 100.)

Again it was contended that if binding originally, it was rendered void by the failure on the part of Judge Hughes to "satisfy" his *partnership obligations*,—that the term "*obligations*," as used in the acceptance of General Denver, meant that each partner should do his *full share of work* as well as settle his own drafts before any decision could be made; and that as Judge Hughes did not do his share of work, the condition was broken and the agreement became void.

The testimony shows that the firm was at that time indebted to General Denver $7,000 on account of the firm note paid and taken up by him, and also that Judge Hughes' individual account was considerably overdrawn, and General Denver undoubtedly meant *at the time* that before there should be any payment to the estate of a deceased member his indebtedness should first be adjusted, and this is nothing more nor less than the law would have required. Whether he so meant or not, this is the plain import of the language, and as there is no latent ambiguity to be explained, the words must speak for themselves.

Again, it was argued that the contract was abrogated by the subsequent quarrel of General Denver and Judge Hughes, although not one word was ever spoken between them on the subject of the agreement from the time of its execution to the death of Judge Hughes. With due respect to the learned counsel, I think it hardly necessary to argue this proposition in this Court.

The complainant might well consent that the agreement of August, 1869, was a nullity, for then his estate would be

entitled to the one full third of all that might at any time be realized from the partnership business, without reference to whether it was "nearly finished" or but just commenced at the death of Judge Hughes.

If the agreement of August, 1869, be void, the rights of the parties are determined by the general law of partnership.

The case was conducted by the defendants before the arbitration and in the Court below upon the untenable theory that if this agreement were void the complainant was entitled to recover nothing.

We have chosen to stand upon the agreement because we have no doubt of its binding obligation upon the parties to this suit, and not because it is our interest to do so.

I come now to the Lamar and Martin case, in which the defendants have received a fee of $66,911.24.

In 1868 Hughes, Denver & Peck filed a petition in the Court of Claims for Lamar, claiming the right to recover a large amount for himself and as factor for Martin, on account of cotton captured by the army of the United States in Savannah. On the 2d of June, 1873, a judgment was rendered in that Court in favor of the claimant for $579,343.50. An appeal was allowed to the Supreme Court on the 30th of August, 1873, and on the 7th of April, 1874, a mandate of the Supreme Court dismissing the appeal was filed in the Court of Claims, and the whole of the judgment was shortly after paid.

The defendants insist that Judge Hughes' estate is entitled to no part of the fees in this case—

1st. For the general reason applicable to all the other cases, that he did not do his share of the work.

2d. Because Judge Hughes withdrew his appearance as attorney in the case before judgment.

3d. Because he quarreled with and denounced Lamar and his case.

The first objection I will not further now discuss, and proceed to the second.

It will be remembered that Judge Hughes died October 21, 1873, more than four months after the rendition of the judgment by the Court of Claims, and but five months before the dismissal of the appeal and the payment of the judgment. Nothing of importance was done in the case between the rendition of the judgment and the dismissal of the appeal, as will appear by the certificate of the clerk of the Court of Claims on pages 164–5 of the Record.

I think there can be no doubt that the complainant is entitled to one-third of the fee in this case, if entitled to anything.

How did the withdrawal of Judge Hughes affect his right to a share of the fee collected by his partners?

This is not a question between attorney and client; the client is not here complaining that his interests have suffered by reason of the withdrawal of one of his counsel. The case was successfully tried by the partner who had all along had charge of it, and the rights and interests of the client were in no way affected by it, nor was he ever heard to complain of it, so far as we know from the testimony or otherwise.

I think Mr. Justice Peck should not have allowed the motion; for it will be observed the allowance was not the act of the Court, but of Justice Peck at Chambers. The client is entitled to the use of the names of all the partners composing the firm employed by him until the conclusion of his case.

In the case of Cook vs. Rhodes, (cited in note at pages 273–4, 19th Ves. Jr.,) on motion to dissolve an injunction upon dispute between law partners, &c., it was held that they could not turn the client over to one of the firm, and where one of the partners had retired upon an annuity, the client was entitled to have the use of his name until his business was concluded.

I do not deny but that for good cause and upon notice to the client, the Court, after hearing, might allow an attorney to withdraw from a case. But here was no showing and no notice to the client, but under the impulse of sudden anger, one of the attorneys applies to one of the Judges at Chambers for leave to withdraw his appearance, and it is at once allowed. This could not be lawfully done. Judge Hughes had no right to make the application, and Judge Peck had neither right nor power to allow it. The right of the attorney to withdraw must be founded upon *good* cause, and an angry conversation is *no cause at all*, and the power to grant the leave, if it exist at all, resides in the Court and not in any single judge at Chambers. If I am right in these views there was no valid withdrawal of Judge Hughes, and the motion was but an unseemly manifestation of passion, and its allowance a hasty and extra-judicial act on the part of Judge Peck.

But supposing it to have been a valid withdrawal, what would have been the effect as between the firm and the client and the partners inter *sese?* If the rights of the withdrawing partner are affected, so are those of the firm, for their interests are *joint* and not *several*, or *severable*, and if one be affected they are all involved. If, then, the Court find that one partner has good cause for withdrawal, it applies to them all, for as we have seen, the client is entitled to the use of the names of all the members of the firm, and there can be no severance of the partners in the management of a cause, except by the express agreement of all the parties in interest, which is not this case. Allowing the withdrawal of Judge Hughes to have been valid, the client had the right to reject the other members of the firm and employ other counsel, or he might choose to go on with the names of other members of the firm if they chose to continue; and although the name of Hughes might disappear from the further proceedings in the case, his interest would remain so long as his partners staid, for

their interests are inseverably united so long as the relation continues.

It is not at all necessary that the business be done in the names of all the members of a general partnership in any business, to entitle each member of it to his share of the profits.

Suppose three lawyers form a general partnership to practice law under the firm name of A. B. and C. Their office and general business is in Washington. A. is employed in a case in Baltimore. He conducts the case entirely in his individual name. Are not B. and C. each entitled to one-third of the fees earned by A., although they were not employed and were not known to the client?

Suppose again the firm is employed to sue Smith, who is a friend or relation of A. He says I don't wish to have my name used in this case, and it is conducted in the names of B. and C., would not A. be entitled to his share of the fees unless he had agreed that he would take nothing?

Or suppose again, that after a suit is brought, an unpleasant state of feeling arises between A. and the client, and he says I will retire from this case, and the client makes no objections to go on with the others, and they make no objections, but continue to prosecute the case in the names of B. and C., would not A. be entitled to his share of the fees, unless he had agreed to relinquish it? Most certainly he would. For as we have seen, each partner is entitled to a share of the earnings of all, and of each individual member of the firm, and this without reference to whether he participate in the labor or not, provided it be business such as the firm is organized to do. And so general is this true that even if one partner should take employment in his individual name and intend that his partners should not know of nor participate in it, yet he would be accountable to them for their full shares of his earnings.

Westerlo vs. Evertson, (1 Wend., 532.)—The doctrine

that one partner cannot sue another at law for any thing relating to their partnership concerns, unless there has been a settlement, a balance struck, and an express promise to pay, applied to law partners.

McFarland vs. Crary & McLean, (8 Cow., 253.)—The defendants, who were attorneys and partners, were jointly sued for money received by one of them on account of firm business. Says the Court: "As McLean alone received the money, and he alone refused to pay it over, it is concluded that Crary is not liable. The defendants are partners, and constitute but one person in law. The act of one in the business which constitutes the subject-matter of the partnership, is the act of all the partners, at least *civiliter*. If one of two attorneys, who are partners, receives money collected for a client, and absconds with it, that forms no defence to the other partner. If one should be guilty of extortion, though the other could not be punished criminally, yet he would be liable to repay what had been illegally received. The cases of trustees, and of a surety, and other individuals liable, do not apply. The defendants are partners, and liable, as such, if at all."

Warren & Post vs. Griswold, (8 Wend., 665,) was an action of assumpsit to recover the amount of a bill of costs in a suit prosecuted by them for the defendant. The plaintiffs were partners as attorneys, and commenced and prosecuted a suit for Griswold; in the prosecution of it, the name of Post alone was used, and his name appeared alone on the Record as the attorney for the plaintiffs. The plaintiffs were equally interested in the taxable costs of all common law suits prosecuted by them. They proved the amount of the bill as taxed, and rested. The defendant moved for a non-suit, on the ground that inasmuch as Mr. Post alone was the *attorney of Record*, he alone was entitled to the taxable costs, and the plaintiffs could not join in an action for the recovery of such costs.

The motion was granted, and the plaintiffs were non-suited, who sued out a writ of error.

Says the Supreme Court: "A partnership between attorneys is admitted to be lawful. Like other partnerships, it may be composed of two or more individuals, and all will be responsible for the acts of each, within the scope of partnership. They constitute but one person in law. If one of two attorneys, who are partners, receives money collected for a client, and embezzles or absconds with it, that will form no defence to the other partner. If one should be guilty of extortion, the other would be liable to repay what had been illegally received. If a suit instituted in the name of one should be unskillfully conducted, the other would be responsible to the client in an action for his damages. Both would undoubtedly be liable to the officers of the Court, or others, for services rendered in suits conducted in the name of one. Indeed, every *responsibility* which belongs to other partnerships attaches also to this; and no reason is perceived why the general rules by which the course of proceedings in such cases is regulated, should not also apply."

The judgment was reversed.

Lansing vs. McKellup, (7 Con., 416.)—D. Russell, for the defendant, moved to set aside the default for not pleading, for irregularity. C. L. Allen, Esq., was named as the attorney on Record for the defendant, with whom Mr. Russell was partner as attorney; but the business of the partnership was done in the name of Mr. Allen. The declaration was served on Mr. Russell in his absence on business from his office. On this service the default was founded."

"Curia.—The service was regular on Mr. Russell. Though Mr. Allen alone is named, they are, in effect, both of them attorneys in the cause. It is Russell and Allen acting under the firm of Allen; and their rights and liabilities are the same as if both names appeared."

Motion denied.

Livingston vs. Cox, (6 Barr, 360.)—This was an action by Cox against the administrator of Livingston to recover damages on account of the failure of Livingston to collect a note placed in his hands by Cox.

Mahan & Livingston were partners in the practice of the law. Cox applied to Livingston to collect a note from Dubbs. Livingston gave Cox his individual receipt for the note. On the same day he made out a *præcipe* for a suit against Dubbs, and signed the name of Mahan & Livingston. No writ was issued, however, until six months afterwards, when, Livingston having died, the *præcipe* was altered by inserting Irwin's name in the place of Livingston, whom he had succeeded in the firm. This action was taken without any direction from Cox. It was proved that the money might have been obtained from Dubbs had the suit been commenced at once; but he subsequently became insolvent.

The Court below held that the contract having been made with Livingston, the fact that he practiced with Mahan did not affect the case.

Upon this point, the Supreme Court of Pennsylvania says: "But at the time of the inception of the contract declared on, the defendant's intestate was associated in partnership with John D. Mahan, Esq., as Attorneys at Law; and the subject of the contract being written, the objects of the firm and the scope of its business, is to be taken in law as made with the firm, though but one of the partners negotiated it, and the plaintiff was ignorant of the partnership at the time, unless the transaction be marked by some peculiarity which will prevent it from falling under the operation of the general rule. It is of no consequence that a contract was made with and on the credit of one partner alone; for if the acting partners intended it at the time, for the use and benefit of the partnership, the law implies an obligation upon the part of all who are entitled to a share in the profits. The rule is thus established for the benefit and protection of those dealing with partners;

but it also operates for the protection of those thus associated, for if a less number than all be sued, it may be pleaded in abatement;" "and if one of the partners die, no action will lie against his representatives, except upon a suggestion and proof of the insolvency of the survivors. Tacitly admitting this principle to be operative in the case of partners formed for commercial or other trading purposes, the learned Judge, who tried the case below, seems hastily to have adopted the idea that there is something different in the nature of a partnership, entered into with a view of carrying on the business of an attorney at law, which frees it from the dominion of the general law of partnership; and this probably led him to give less attention to the first point, upon which the defendant prayed his instructions to the jury, than its importance under the facts in proof demanded. But the idea is entirely erroneous. The law recognizes professional associations between attorneys for the prosecution of their particular business, as lawful, and admits of no distinction between them and other partnerships, at least so far as relative rights and liabilities are involved, as in other partnerships, each member is entitled to any benefit accruing from the conduct of the others; and all are liable for the acts and receipts of each within the scope of the partnership business. Thus, though but one of them appears to and conducts a suit in Court, all are entitled to the fees earned, and an action may be maintained in their joint names. Warner & Post vs. Griswold, 8 Wend., 665. So the service of a note upon the one not appearing is service upon all. Lansing vs. McKillup, 7 Cow., 416. If one partner receives professional money belonging to a client and absconds with it, the others are liable to answer in damages. McFarland vs. Crary, 8 Cow., 253.

And, to come home to the case in hand, there can be no doubt that if a suit at law be unskilfully or negligently conducted by one of the partners, the others will be responsible to the client in an action for damages. 8 Wend.,

666; this principle has been announced by the Supreme Court of New York, and is not only in accordance with the general action that governs partnerships, but is sustainable upon considerations of public policy, as being necessary to the protection of the suitor, who is compelled to give his almost unlimited confidence to the legal practitioner. It is not, therefore, to be tolerated that the responsibilities of professional partnerships should be held as less extensive and stringent, than those which attach upon similar associations for the prosecution of business connection with general trade.

After the retirement of Judge Hughes the defendants made a written contract with Lamar for ten per cent., as they claim, for their own services—and as this amounted to only about $67,000—they seem to feel aggrieved because they did not get more, and, of course, they are reluctant to divide this insignificant fee. Mr. Peck, in p. 167 of the Record, says, that they had no contract with Lamar for fees at the time of the retirement of Judge Hughes, but that they had hoped to get 20 per cent.; that Lamar had indirectly expressed a willingness to pay 10 per cent. It is nowhere said by any one that Lamar had ever at any time intimated that he would agree to pay more than 10 per cent. Mr. Roane on p. 156 testifies that he heard Lamar tell Judge Hughes that the fee was to be 10 per cent. It is simply absurd and ridiculous for these gentlemen to pretend that they are injured because they get but $67,000 for services which $5,000 would well and liberally have compensated.

The fact is, the fee was an enormous one, and was neither increased nor diminished on account of the attempted withdrawal of Judge Hughes. Lamar knew that his case would go on after as before, and he manifested no concern or care about the withdrawal, if indeed he knew it at all. There is no competent evidence that Lamar ever knew of it.

Mr. Peck, on p. 169 of Record, says that he was present

when Judge Hughes told Lamar that he intended to withdraw, and Lamar replied that he was glad of it. The testimony of Mr. Peck as to what Judge Hughes said is, of course, incompetent. But if it be accepted as a fact, it only shows the indifference of Lamar on the subject.

It is said Judge Hughes relinquished his interest in the fees in the Lamar case.

Mr. Peck, on p. 166, Record, says Hughes told him he was going to require Lamar to settle with him personally for services he had rendered.

The whole of the evidence of Mr. Peck as to conversations and transactions of Judge Hughes is incompetent (Revised Statutes, Sec. 858), and was objected to, and of course will not be considered; but the statement is at variance with the written evidence as found in the original motion, as proposed by Mr. Peck and allowed by Judge Hughes, and filed and presented by his order as evidence of his intentions. See testimony of Mr. Roane, pp. 153–4–5–6 of Record; see also Exhibit 7, p. 8 of Record; see also testfmony of Peck, pp. 166–7.

Mr. Peck, in his answer at page 36, referring to what took place when his motion for withdrawal was allowed by Judge Peck, says "he [Hughes] denounced the said Lamar as a scoundrel, and the claim as fraudulent; and, in reply *to a question of the judge in regard to the fee*, said that he would not touch a dollar of it."

And Judge Peck in his evidence, on pages 179–80, sustains the allegation of the answer.

Why should Judge Peck, when called upon to act in his sacred office as judge be solicitous to know whether this irate lawyer in the moment of his folly and passion intended to take fees in the case or not? Who was to be benefitted by the refusal of Hughes to share the fee?

I think that any friend of either the father or son upon reading these passages from the Record must feel the hot blood mounting to his cheek.

But it is claimed that Judge Hughes forfeited his rights

by denouncing Lamar and his case. Who says he did the one or the other? Mr. Peck says so. But he is not competent to testify as to what Judge Hughes said. Who else? Judge Peck, the father, once only.

I invite the attention of the Court to this most extraordinary testimony on page 179 of the Record.

The denunciation of Hughes made an unfavorable impression upon his mind, and yet he don't remember whether he told the other judges or not.

Here is a judge who learns from counsel that he wants to retire from a cause because it is a fraud upon the Government, and the information makes an unfavorable impression upon his mind, and yet he suffers his fellow-judges to render a judgment for more than half a million of dollars against the Government which he is serving, without making a move or an inquiry to ascertain the truth of the charge. He cannot even remember whether he communicated this damaging information to his fellow-judges; but he does clearly remember that Judge Hughes told him he would not soil his hands with fees gotten from so fraudulent a case.

If it were true that Hughes did denounce Lamar and his case, and say that he did not intend to take a part of the fee, the event showed that it did not injuriously affect the case, and the Judge to whom it was said—for reasons which we will not seek—did not even mention it to his associates.

I need scarcely argue that Hughes could not forfeit his legal right to his share of the fee by angry expressions as to the client or the case, which had no injurious influence upon the result.

Mr. Roane testifies that Mr. Peck himself denounced Lamar and his case in much the same terms ascribed to Judge Hughes, (see Record, p. 157;) and Mr. Peck comes pretty near admitting it, (Rec., p. 168;) but whether he did or not is totally immaterial, as he won the case and got the fee.

If Lamar had required that other counsel should be employed to supply the place of Hughes, it would have probably been equitable that Hughes should have been charged with the amount paid counsel to take his place, but there is no such element in the case. The case was tried by Mr. Peck alone and won, just as it would have been if Hughes had never made his useless motion, and Judge Peck had never made his void order.

The fees of this firm were enormous—perhaps one-tenth of the amount actually received would have been a full compensation for all the labor bestowed upon their cases. Their large income was due chiefly to their contingent contracts, and not to the labor, skill, or learning embarked in their business. Either one of these gentlemen (although highly respectable) in an ordinary line of law practice, would have probably deemed himself successful with a professional income of five or six thousand dollars a year, and probably no one of them before they entered upon practice in the Court of Claims ever in his life earned in his profession more than $5,000 in one year, if so much.

Judge Hughes was the senior of the firm, and had been a member of the Court of Claims, and would naturally be sought by clients having cases to prosecute in that then new tribunal.

Gen. Denver, although a highly respectable and well-known gentleman, had no established reputation at Washington as a lawyer, and Mr. Peck was a young lawyer at Chicago, and was introduced into the firm by Judge Hughes at the request of his father, who had been Hughes' associate upon the bench of the Court of Claims.

It is no disparagement to either of these defendants to assume, that in the early period of their practice at least, the heavy employments came through Judge Hughes.

Is it not strange that these two surviving partners, who have both been enriched and enabled to retire from arduous labors at a time of life when most of lawyers, perhaps

equally deserving, and who have worked as hard and as long as they, are still compelled to toil, should withhold from the man who laid the foundation of their fortunes, the share which by law and good conscience is most righteously his.

The facts of the case will be found elaborately arranged, classified and ably discussed and commented upon in the printed brief of the complainant, Mr. Roane, and to it I respectfully refer the Court.

The decree of the Court below was unanimous and will be found on page 208 of the Record.

It established the contract of August, 1869, and remanded the case to the Special Term.

The order of reference to the Auditor by the Special Term is on pp. 208–9 Record.

The report of the Special Auditor is found on pages 239 to 244, inclusive.

Defendants' exceptions to the Auditor's report are found on pages 244–5–6 Record.

The final decree of the Court in General Term, overruling the exceptions and affirming and confirming the Report in all things, is found on pages 246–7.

If this Court should sustain the decrees of the Court below, there is no controversy about the amount to which the complainants are entitled.

S. S. HENKLE,

Of Counsel for Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 240.

JAMES W. DENVER AND CHARLES F. PECK,
APPELLANTS,

vs.

ARCHIBALD ROANE, EXECUTOR OF JAMES HUGHES, DEC'D.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

BY

ARCHIBALD ROANE,
Executor.

WM. H. MOORE, PRINTER, WASHINGTON.

Supreme Court of the United States.

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APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

I. STATEMENT OF THE CASE.

The law firm of Hughes, Denver & Peck was formed in the City of Washington in the year 1865. It was organized for the purpose of practising law in the Courts in the District of Columbia, local and federal, and of prosecuting claims before the Executive and Legislative Departments of the Government and the various international Commissions for the settlement of claims. Its principal business, however, was in the U. S. Court of Claims.

James Hughes, now deceased, whose Executor is the Appellee in this Court, was the senior member of the firm. He had been a member of the House of Representatives from the State of Indiana, a Circuit judge in the same State, a Professor of Law in the University of Bloomington, Ind., and subsequently he had been a judge of the

United States Court of Claims. He was also an intimate personal and political friend of President Johnson and Secretary McCulloch, both then in office, (Record, pp. 149 and 151.) He had enjoyed, as the Appellants here, in their Answers to the Bill of Complaint in the Court below, admit, at least "a respectable but" as they say "not an extraordinary political and legal reputation." (Record, pp. 11 and 30.) Having resigned his position in the Court of Claims, Judge Hughes, with unwise generosity, in view of his personal standing and advantages, invited and associated with himself, upon equal terms, but without written articles of agreement,—first, James W. Denver, and afterwards Charles F. Peck, (R., pp. 11 and 30,) neither of whom then possessed professional reputation. Mr. Denver had respectably occupied several political positions and Mr. Peck was a young lawyer in Chicago, unknown to fame, (R., p. 152.) The firm was prosperous from the very beginning—received an immense amount of business, chiefly from the south, and soon realized very large profits, (R., pp. 11 and 30.) The business was conducted harmoniously until November, 1866, when a disagreement occurred which led to a temporary dissolution, but the firm was shortly afterwards reorganized, (R., p. 181.) At length, on the 18th day of March, 1869, a final dissolution took place and the following agreement was signed by each member of the firm:

"It is agreed by and between the undersigned, members of the law firm of Hughes, Denver & Peck, as follows:

1st. From and after this date business will not be received in partnership, but each member of this firm shall be allowed to receive and transact business on his own account, taking to himself the emoluments therefor without an accountability to the others or either of them.

2nd. All new business coming to the firm of Hughes, Denver & Peck through the mails, shall be equitably divided as the undersigned shall agree.

3rd. The business of the firm heretofore received and now in hand, shall be closed up as rapidly as possible by

the members of the firm, as partners under their original terms of association and in the firm name.

4th. No new business nor entries relating thereto, shall be made on the firm books, but only such entries as shall be necessary and proper to the closing up of the business and cases already in charge of the firm.

(Signed) JAMES HUGHES.
J. W. DENVER.
C. F. PECK.

Signed in triplicate and dated March 18, 1869."

(Record, p. 8. Exhibit A. R., No. 1.)

During the Summer of the same year, that is to say, in the month of August, 1869, the following agreement in the form of a letter was made, defining the interests of the parties in the business of the old firm of Hughes, Denver & Peck, in case of the death of any one of its members:

"WASHINGTON, *August* 13, 1869.

Gen'l J. W. DENVER,
Wilmington, Ohio.

Dear General: Arthur goes this evening. Mr. Peck leaves on Monday. I am waiting on the Perry case. Before taking this journey, I am making my will and otherwise providing for accidents. Mr. Peck and I agree that in case of the death of any one of us, his heirs or personal representatives or their duly authorized agent, shall receive one-third of the fees in cases nearly finished and twenty-five per cent. in other partnership cases. Do you agree to this? Answer here.

Yours truly,

(Signed) JAMES HUGHES.

If you approve this, sign it on the other side and return it.

This proposition has been submitted to me and I agree to it.

(Signed) CHAS. F. PECK.

I agree to this, but with the express understanding that all the partnership obligations shall be first satisfied before any such division can be made at any time.

(Signed) J. W. DENVER.

WILMINGTON, OHIO, *Aug.* 18, 1869."

(Record, p. 6. Exhibit A. R., No. 2.)

For several years after the execution of the agreements above set forth, each member of the old firm received and conducted new business on his own account and at the same time attended jointly to the old business, as it progressed. This old business, as previously stated, was very large and lucrative, and consisted principally of cases in the Court of Claims and in this Court upon appeal.

During the greater part of the years 1872 and '73 Judge Hughes was an invalid and was generally incapacitated for business, but with partial intervals of apparent restoration of health. (See Dr. Wells' Testimony, Record, pp. 197–200.) At length, on the 21st October, 1873, he died of the painful disease, *angina pectoris*, with which he had been so long afflicted, leaving the Appellee in this Court his Executor. At the time of his decease, many cases belonging to the firm of Hughes, Denver & Peck were undisposed of, some of which have not yet been finished. A list of these cases will be found in the Report of the Auditor on pages 241 and 242 of the Record, classified in accordance with the agreement of August 13, 1869, under the heads of "Nearly Finished" and "Other Cases," and also a list of the fees under each head which have been collected by the Appellants and retained by them. In January, 1874, a few months after the death of Judge Hughes, upon the request of his Executor, the accounts between the different members of the firm were adjusted and an estimate made of all the debts due. It was found that after all deductions, including a small amount to be retained by Messrs. Denver & Peck for current expenses, about $9,000.00 from recent collections remained for division, of which a payment of $3,000.00 (one-third) was made to the Executor. (Record, pp. 55, 81, 103–105, 135 and 136.)

Shortly afterwards, other fees to a very large amount were collected, (R., p. 243,) and Messrs. Denver & Peck, upon frivolous pretexts, as it was believed, or upon *newly discovered* technical defences, refused to make any further division. Whereupon, after exhausting conciliatory meas-

ures, (See letters of Executor to Messrs. Denver & Peck, record, pp. 6–13,) suit to compel payment, was brought by the Executor, which, after ineffectual efforts to settle, first, by reference to arbitrators, and next, by private negotiations, finally terminated in the unanimous judgment and decree of the Supreme Court of the District of Columbia in favor of the Executor, for nearly the whole amount that he claimed. The amount of the judgment was $43,592.45, with interest from its date, November 29, 1875, (R., p. 246.) Of this amount, it will be found from the Auditor's Report (R., p. 244,) that $42,029.58, were the proceeds of cases "Nearly Finished" at the time of the death of Judge Hughes; that all except one of the cases were judgments of the Court of Claims, obtained in his life time and appealed to this Court, and the appeals after his death, withdrawn or dismissed by the Attorney General without argument here (R., pp. 216 to 220, 240 and 241.) The one case excepted, was a case before the American and British Commission in which an award was rendered previous to his death but not collected until afterwards, (Auditor's Report, p. 241.) Among the "Nearly Finished" cases, in which fees were collected by Messrs. Denver & Peck will be found the case of G. B. Lamar, in the judgment for which, is also included the case of D. A. Martin for whom Lamar was a factor; no separate suit having been brought in the name of Martin. In these two cases, in reality one, the large fee of $66,911.24 was collected (R., p. 243.) There are some facts connected with these cases which require a separate statement and discussion. This will be found at the close of the brief.

II. Remarks upon the Statement of facts.

The Appellants here do not deny, as we understand, the facts as above stated, except perhaps, from whatever motives, the statement of the *leadership* of Judge Hughes in the conduct of the business of the firm. This however, ~~except~~ unless incidentally, is of no importance in the decision of this case, and it is therefore not worth controversy, but it

+ the services whatever rendered in the meantime,

is true nevertheless. To justify themselves for withholding money due to the estate of their former partner, in their Answers to the Bill of Complaint and in the testimony in support of them, given solely by themselves, they attempt to make certain points to which we will now proceed to reply.

1. *As to the Agreement of Dissolution of March* 18, 1869.

The plain meaning of this agreement, which we have above cited at large and which is also to be found in the Record, p. 5, is, that the partnership between the parties was dissolved, as to all new business received by each member of the firm after that date, and that it remained *in force and unbroken* as to the old business then on hand and undisposed of. The Appellants here, say in their brief in the Court below, that after this dissolution, the parties were no longer partners, but merely three lawyers employed together in the same cases with joint fees, or in other words, they were a mere union of workers, like "three Irishmen mowing a field together," or three wagon-makers, one dying after the wagon was ordered, or three school-teachers, one dying after the term had commenced, or "three chimney-sweeps, each with his own bag and scraper." And they further say, that as there was no joint ownership of anything, that the parties were merely *quasi*-partners. If this be true, they were equally *quasi*-partners, before as after the dissolution, and there never had been any real partnership between them. This is manifest from the third article of the agreement of dissolution, which states in express terms, that the old business should be "closed up as rapidly as possible by the members of the firm *as partners under their original terms of association and in the firm name.*" By what forced construction this plain language can be evaded it is impossible to see. As to joint ownership, the evidence shows, *passim*, that the old business on hand at the date of the agreement of March 18, 1869, was of immense value and consisted of numerous

cases, before Congress, the Courts, the Departments and Commissions, in every stage of preparation from the first initial steps almost to the last. In all these cases they had profitable contracts with their clients, in which each member of the firm was equally interested and of which no one of them divested himself by the act of dissolution or by the terms of the agreement of March 18, 1869. They certainly, then, possessed a joint ownership in these contracts constituting a capital of great value, from which large profits were afterwards realized, and other profits may hereafter be, in cases not yet disposed of. The sublimated doctrine has been laid down by the learned counsel of the Appellants, that "the fees and compensation of lawyers are the exact equivalent of services rendered" and that "all beyond is extortion," and that there is no such thing as "profits" in a law partnership. This might be accepted in Utopia or in Plato's Republic, but scarcely in the practical transactions of business in modern times. But if so, the enormous fee of $66,912.24 *collected, not earned*, by Denver & Peck in the Lamar case, for their alleged separate services of five months, furnishes a painful commentary upon the principle enunciated. It is not necessary to pursue this subject. Metaphysical distinctions and attenuated arguments cannot overthrow plain propositions of common sense.

2. *The Agreement of August* 13–18*th*, 1869, *for Division of Fees.*

This agreement previously set forth at large in the brief and in the Record, p. 6, consists of a letter written by Judge Hughes to Genl. Denver, endorsed by Mr. Peck, assenting to the proposition contained therein, transmitted to Genl. Denver, and returned by him with his endorsement, (R., p. 55.) It is claimed, that the endorsement of Genl. Denver contained a *condition* which was never fulfilled, and that therefore the agreement is void. The proposition of Judge Hughes was that in case of the death of

any of the partners, the heirs or the representatives of the deceased partner, or their agent should receive one-third of the fees in cases "Nearly Finished" and twenty-five per cent. in "other" partnership cases. This referred of course to the business of the old firm. Mr. Peck gave his unqualified assent and Genl. Denver assented in these terms: "I agree to this, but with the express understanding, that all the partnership obligations shall be first satisfied before any such division ~~be had~~ can be made at any time."

The Appellants here, claim that the agreement was void, because Judge Hughes did not formally accept Genl. Denver's endorsement. The answer to this is—that there was nothing in it to reject, and nothing to require formal acceptance. The endorsement by Denver was but the statement of a recognized legal proposition for the payment of debts before the division of fees and it cannot be interpreted to constitute a *condition*. The obligation would have been the same, with or without Denver's endorsement. The letter when returned was filed away, by Judge Hughes, (R., p. 55,) and it, with his endorsements, constituted a *completed contract, embracing both proposition and acceptance*, for the division of fees in case of the death of any of the parties, and this contract was for the common and mutual benefit of all. The "partnership obligations" of course, as matter of common honesty, were to be satisfied before any division of fees should be made. These "partnership obligations," according to the only legal intendment of the words, were the debts then due or which might thereafter be due from the firm, in the event provided for. These words are familiar to the profession and they have a common commercial and technical meaning and can only refer to the joint pecuniary obligations of the partnership.

The evidence shows, that Genl. Denver at that time held a firm-note for $7,000.00 which he had taken up out of his private funds, and that Judge Hughes had overdrawn his account several thousand dollars. It was the mani-

fest object and meaning of the "express understanding" to provide for the payment of these debts. The note, with its *accrued interest*, was paid eighteen months before the death of Judge Hughes, and his overdraft, then very small, was adjusted soon after his death. (R., p. 55.) Genl. Denver says (R., p. 119) that "it was years before I got the money back," but the important point is, that he did get it back. It was actually paid April 13, 1872.

The Appellants also claim, and Genl. Denver in his answer (Record, p. 13) himself asserts, that in the use of the words, "all partnership obligations shall be first satisfied before any such division can be made at any time," he meant specially to bind and obligate Judge Hughes to attend "faithfully and diligently to the business of the dissolved firm, which he was inexcusably neglecting." To say nothing of the insolence of such a proposition from *Genl. Denver* to a man of Judge Hughes' character and professional standing and reputation, he was very unfortunate, at least, in the use of his language, for it conveys no such meaning, and courts of justice do not listen to afterthoughts and forced interpretations of plain words. It is an important fact that this interpretation of Denver was never heard of until after the death of Judge Hughes. (R., p. 56.) The proposition made by Judge Hughes was to provide for a division of fees in case of the death of one of the partners, and *had no reference whatever* to the conduct of the business of the firm during the life-time of all its members. It was strictly a *post-mortem* agreement, and was to have no effect, except in case of death. There was nothing for the agreement to operate upon, until death gave it life. If all the members of the firm had lived until the old business had been closed up, the division of *all* fees would have been equal. Judge Hughes made the proposition—he had no reason to believe that he would be the first to die, and therefore, it cannot be said, that he made it in his own interest. The proposition itself shows not only his foresight but the justice of his

nature, which unfortunately his former partners do not appreciate, but, on the contrary, they seem now to regard it as a trick contrived solely for the benefit of his heirs and representatives. The evidence shows (Record, p. 99) that Mr. Peck, *then sick* and in fear of death, obtained through his brother-in-law, a copy of the agreement in custody of Mr. Roane, now Judge Hughes' Executor, and Mr. Peck himself testifies (Record, p. 100) that he regarded it as settling the rights of his heirs and representatives in case of his death. Why it should apply to him and not Judge Hughes, he omits to state.

Genl. Denver might have objected, if he chose, to Judge Hughes' *proposition* for a *post-mortem* division of fees accruing from unfinished business, or he might have made it *a condition of his assent* to such a proposition, that all the debts of the firm should first be paid and overdrafts adjusted, and that Judge Hughes should thereafter devote himself to the business of the old firm; but he did no such thing, and his words, "partnership obligations shall first be satisfied," convey no such meaning. The agreement, in its plain terms, had no reference to anything to be done while all the members of the firm still lived. It provided only for the division of fees after death, and the expression "such division at any time," logically and grammatically, can only refer to the division of fees, with the representatives of the deceased partner, proposed by Judge Hughes. This is the only construction warranted by the language used. The words "at any time," upon which much stress has been laid and much ingenuity fruitlessly expended, if they have any meaning at all, can only signify, in their connection with the subject-matter, "any time" after death. Third parties cannot legally be bound by forced and unnatural interpretations placed, from obvious motives of self-interest, upon ill-constructed sentences, and Genl. Denver cannot be permitted to interpret his words to mean more or less than their natural signification.

If these words applied to a division of fees to be made during life, it was not "such" a division as Judge Hughes proposed and Genl. Denver accepted. "Such" is the qualifying word of the clause, and it defines both the *nature* and the *time* of the "division" contemplated. The *time* was "after death," and the *division* itself was, of fees in the two classes named, viz: "Cases Nearly Finished" and "Other Cases." Under the circumstances, "such" was an unfortunate word for Genl. Denver to have used, if he meant what is now claimed.

Judge Hughes has been accused under their interpretation of violating this contract, if, as they say, it was a contract, by receiving and appropriating fees arising from the firm business, while debts of the firm still remained unpaid, and an exhibition has been ostentatiously made of the amounts he so received from time to time. It is not even alleged that he received more than the one-third to which he was entitled. How could a contract be violated which, according to its very terms, was to have no effect until after the death of one of the parties? But, if the contract was void as to all because broken or violated, as they assert, on one side, then the law of partnership prevailed, and each member or his representative, after death was entitled to a full third of all the fees. The elaborate argument of the learned counsel proves a little too much, and it might have been more logical and in better taste, if the opprobrious expressions, charging Judge Hughes even hypothetically, with "gross wrong," "fraud," and "turpitude," had been omitted. It is to be observed, that Mr. Peck, as well as Judge Hughes, received his proportionate share of accruing fees, before the debts of the firm, including Genl. Denver's $7,000.00 note, had been settled, and no notice has been taken of this fact. If, then, the contract has been violated by the one, it has been equally violated by the other.

3. *The Settlement and Adjustment of Accounts after Judge Hughes' death.*

Enough has already been said to prove the binding force of the agreement of August, 1869; but if not, it is only necessary to refer to the division of money on hand in January, 1874, made with Judge Hughes' Executor, previous to the commencement of this suit. This division, we contend, was a recognition of the contract by Messrs. Denver & Peck. When the division was made, $18,000.00 in fees had been collected, and it was found, after an adjustment of the accounts of the different members of the

firm and a memorandum taken of the debts due, that about $9,000.00 remained. Mr. Peck says (R., p. 103) that if he recollects rightly the amount was considerably over $9,000.00, but in this he is mistaken. The original memorandum can be produced. Of this $9,000.00, $3,000.00 were paid to the Executor and receipts taken "on account." (R., pp. 55, 81, 103, 104, 105, 136.) Because the receipts were given in this way, the Appellants contend that they did not recognize any specific amount to be due. An examination of the record will show that in the memorandum above alluded to, (R., p. 55) that some of the debts were not *ascertained*, and that their amount was merely estimated from *data* then accessible. For this reason, the receipts were given "on account," and they could not have been given in any other way, without relinquishing the right to correction, if the estimates proved to be too high. The division was as nearly equal as it could have been made, under the circumstances. A copy of the contract of August 17–18, 1869, had been transmitted by the Executor several months before, to Messrs. Denver & Peck, (R., p. 6: Exhibit A. R. No. 3,) and, as the division of fees was made according to its terms, without repudiation, protest, or even objection, it is a reasonable presumption that they regarded this contract as furnishing the rule for such division. It was not until some time after this division, namely, in April, 1874, when a demand was made for a second division of fees then recently collected, that Genl. Denver first informed the Executor that his endorsement upon the contract "was a conditional one which Judge Hughes had never accepted," (R., p. 56.) Messrs. Denver & Peck had already acted upon the contract and made payment according to its terms, and they are therefore estopped from repudiating it at a subsequent period. They are bound not only by a moral, but a legal obligation, which they cannot escape.

4. *As to the meaning of the expression "Nearly Finished."*

Before leaving this branch of the subject, it is proper to make some comment upon the meaning of the expression "Nearly Finished," used in the letter of Judge Hughes of August 13, 1869. This term has no legal significance and its meaning is therefore merely a question of common sense and common reason. The Appellants here seem disposed to claim, that the time elapsed between the beginning and ending of a case, is the principal element to be considered in the decision of this question, and Genl. Denver goes so far as to say, that he considers no case as "nearly finished," if any thing remains to be done, *except* to collect the judgment (Record, pp. 227 and 228.) Surely no answer is required to such a construction of these plain words. The average man of ordinary intelligence, would regard a case as "finished" when the only thing to be done, was to collect money from the Treasury. The very use of the terms, "nearly finished," conveys the idea, that some labor yet remained to be performed. A poem, a painting, a statue, a building, or any work of the human brain or hand, may be "nearly finished" in fact, but years may elapse before its final completion or it may never be completed. It is labor itself, not the intermission of labor, which can rightly be computed. Time alone is an element of very little importance. In a law case, after the papers have been prepared, the evidence taken, the brief filed, the argument made and the judgment obtained, and if an appeal is taken, the appeal withdrawn or dismissed before it reaches the Appellate Court and is never there considered, it can surely be regarded as "nearly finished," although some routine work in procuring the withdrawal or the dismissal of the appeal may have been performed.

The Special Auditor who made up the account between the parties to this suit, as we think, properly defined the meaning of the words "nearly finished" in the following language: "I am of opinion that such cases as had gone

to judgment in the Court of Claims at the death of Judge Hughes and if appealed to the Supreme Court of the United States, the appeals withdrawn or dismissed without trial before the Appellate Court, are fairly within the term "nearly finished," as contemplated by the parties to the contract of August 13th and 18th, 1869, and I so find," (Record. p. 240.) This definition it appears to us, cannot easily be controverted and it settles the *status* of all the cases, which are the subject of this suit, under the head of "nearly finished" except two, (See Auditor's Report and Record, pp. 242 and 243.) In these two cases, one was a judgment of the Court of Claims, in which a motion for a new trial was made by the Attorney General, and upon argument after the death of Judge Hughes, was overruled by the Court and the fee collected. This is the case of John L. Hardee, Executor, and with regard to it, the Special Auditor after stating the circumstances, says: "I am therefore of opinion that no labor of *quality* or *quantity*, was performed by the defendants in this case, sufficient to take it out of the class "nearly finished," (R., p. 241.) The evidence, we think, amply sustains this view, (See R., pp. 66, 91, 92, 229, 230.) The other case was that of John Haskins, a British subject, decided by the American and British Commission, in which an award was made in favor of the claimant in the life-time of Judge Hughes and nothing done afterwards, except to collect the fee, (R., p. 241.) The class of "Other Cases" in which fees were collected embrace but two, and these fees amounted to but little over $3,000.00, (R., p. 243.)

It is to be observed, that in all the cases, except the two comparatively insignificant ones, under the head of "other cases" above referred to, that the judgments were obtained in the life-time of Judge Hughes, and where appeals to this Court were taken, they were *withdrawn* or *dismissed* by the Attorney General without argument. It is further to be observed, and the testimony shows it, *passim*, and particularly pp. 41, 67, 92 of the Record, that the necessary

labor or influence, or whatever it may be called, to obtain the withdrawal or dismissal of appeals, was performed or exercised (and at their own expense) chiefly by the agents of the firm of Duncan, Sherman & Co., of New York, by whom most of these cases were in part owned and by whom or by their representatives, they were placed in the hands of Hughes, Denver & Peck.

Much has been said, and much more may be said in the argument, with regard to the injustice of requiring Messrs. Denver & Peck to work indefinitely for the benefit of Judge Hughes's estate, but the real facts are, as shown by the evidence, that nothing of any moment, so far as the cases covered by the judgment below is concerned, has been done by them since his death. The statement in their answers, (Record, pp. 15, 20, 33 and .39) that these judgments were obtained by them without assistance from Judge Hughes, long after the dissolution, and that the moneys received were not the earnings of the copartnership, convey, whether so intended or not, a false impression that the cases referred to belonged to themselves and not to the old firm. These declarations are mere artifices invented to conceal the facts. The Auditor's Report shows the list of the cases belonging to the firm, and the very ones referred to appear in that list. (Record, p. 241.)

III. Miscellaneous.

1. *As to the abrogation of the Agreements of March and August*, 1869.

The contracts of March 18, 1869, and August 13–18th of the same year, together with the established law of partnership, constitute the basis of the claim of Judge Hughes' estate against his former partners, for his share of the fees collected from firm business since his death and withheld and appropriated by them to their own uses. As skilful tacticians, they boldly assume the offensive, as they have assumed throughout the entire case, in order to make false

impressions, and they say, that even if the papers referred to constitute contracts, contemptuously styled by them "supposed" or "pretended" contracts, they were relieved from all obligations imposed by them, in consequence of the subsequent conduct of Judge Hughes. The statement is made in the Answers of both parties to the Bill of Complaint (R. pp. 20 and 38) that the *agreement of March*, 1869, was abrogated by the existence of the hostile relations between Denver and Hughes, inasmuch as, in such a condition of things, it was impossible they could co-operate harmoniously together as partners,—and also, that when Hughes acceded to the demand made by Denver (R., pp. 28 and 29) for a cessation of all business relations between them, the *agreement of August*, 1869, for the division of fees after death, was wholly abrogated and abandoned, and that thereby Hughes lost and forfeited all rights under these agreements. These propositions are so extraordinary, that it would be difficult to believe that such grounds of defense could be assumed, if they were not to be found in the Record. Why Judge Hughes should forfeit his rights, under the contract, on account of hostile *personal* relations existing between Denver and himself, and why, by his acceding to Denver's demand for a cessation of *business* relations, and the other parties not forfeit theirs, they do not, with wise forbearance, attempt to show. The quarrel did certainly dissolve the personal relations between the two parties concerned, and naturally prevented their co-operation in the conduct of the firm business, but why Judge Hughes more than Genl. Denver should be held responsible for this, and why the one should forfeit his rights and not the other, does not appear. The merits of the quarrel are not set forth in the pleadings nor the testimony, and therefore cannot be discussed here. The two letters, out of six, constituting the unfriendly correspondence filed by Genl. Denver as Exhibits to his Answer, do not show all or even the main facts of the unfortunate difference between the parties. If, as he states, (Record, p. 20,) Judge

Hughes "preferred against him untrue charges that involved infamy and dishonor," in the absence of evidence, Judge Hughes' charges will be received as of at least equal value with Genl. Denver's denial, and this Court cannot determine whether they were true or false. But this quarrel, in reality, was of very little *business* importance, since it will be seen from the evidence, that almost from the very beginning of the partnership there was by tacit, if not positive agreement, a division of duties between the several members of the firm, and that they but rarely co-operated together in the same cases. (R., pp. 63–95–96, 116, 152, 182.) Each had his own class of cases in charge, and the cessation of personal intercourse, while an inconvenience, did not in point of fact interfere with the ordinary routine of business. That a personal quarrel could have the legal effect of abrogating and cancelling a contract and could destroy as to one party and not to another valuable rights of property, is a bald absurdity upon its very face. Yet such is the plain meaning of the declarations of Messrs. Denver and Peck in their Answers, when stripped of unnecessary verbiage. The acceding by Judge Hughes to the demand of Genl. Denver for a division of business, belongs to the same category. It was simply a proposition, which while agreed to, was never carried out. No division was ever made, and it does not appear from the evidence which party was in fault. Rights of property cannot be divested by mere propositions never acted upon.

2. *Neglect of business and abandonment of the firm office.*

The Appellants next present the point, that Judge Hughes forfeited the rights he possessed, if he possessed any, under the contracts of March 18 and August 13–18th, 1869, by his gross neglect of the firm business and his abandonment of the firm office. (R., pp. 19, 20, 38, 39.) These allegations are supported solely by their own interested testimony and by that of Genl. Denver's brother,

who, Judge Hughes for reasons satisfactory to himself, had demanded should be excluded from the firm office. (R., p. 28, Ex't J. W. D., No. 9.) That Judge Hughes in the last two years of his life did not give close attention to the firm or any other business, is a fact not to be denied. The testimony of Dr. Wells his attending physician (Record, pp. 197–200) shows that during those two years he was a confirmed invalid and generally incapacitated for business, but with occasional intervals of partial restoration to health, and that at frequent periods, he suffered greatly from the disease which at length terminated his life on the 21st of October, 1873. The "fishing" and other excursions (R., pp. 121 and 175) which appear from the testimony, to have given so much offence, to Genl. Denver, were undertaken under medical advice. It is an extraordinary fact, or might be considered so, except for the weakness of human nature in matters of pecuniary interest, that neither Denver nor Peck, who had received so many benefits from their association with Judge Hughes, nor their counsel, in the pleadings or the testimony, or their arguments, recognize his serious illness as excuse or even extenuation for his want of attention to firm business, while the temporary illness of Mr. Peck, from which he soon recovered, is greatly exaggerated.

Mr. Peck testifies, not voluntarily, but very reluctantly, under cross-examination, that for two or three years, Judge Hughes ordinarily gave about the same attention to the business of the firm after as before the dissolution of the partnership, (R., p. 99.) This fact also appears, perhaps more positively from the testimony of other witnesses, (R., pp. 60, 62, 63.) Mr. Peck confines his testimony to Court of Claims cases, but this was the principal and almost the only business of the firm at that period, the greater part of the lucrative Department business, attended to chiefly by Judge Hughes on account of *his personal and political* relations with the administration, having been already disposed of, (R., p. 152.) Mr. Peck was the junior partner,

and upon the request of his father, Judge Peck, had been brought into the firm by Judge Hughes, (R., Ibid,) and like all junior partners, he was expected to perform and he did perform, faithfully and well, most of the drudgery of the office. He was, on account of his inexperience, assisted and presumably, was instructed by Judge Hughes in the beginning, in Court of Claims cases (R., pp. 152 and 95,) but the conduct of cases in that Court soon fell almost exclusively into his hands. What Genl. Denver did in these cases was done, according to his own testimony, and we have no other, during Mr. Peck's illness and absence in Europe from February to July, 1872, (R., pp. 95–97, 119,) and which was also, but he omits to state the fact, during the period of Judge Hughes' illness in the same year, (R., p. 198.) Whatever Genl. Denver was capable of doing, as to quantity and quality of work, during this period, it was his bounden duty to do, and it seems to us, that a little too much credit has been assumed by himself and his counsel, for the labor he performed. That he did his duty we do not doubt nor dispute, but the tenor of the evidence shows and the fact is, that nearly all the cases in the Court of Claims were matured previous to the illness of Mr. Peck, who had been working upon them for years. It so happened that many of these cases came on for trial, while Genl. Denver, for the reasons stated, was in exclusive charge of the business of the firm, but the previous preparation running through years had already been made, and what was done by him was chiefly routine labor. Doubtless, briefs setting forth facts, and even oral arguments may have been made in some few of these cases, but most of them were merely submitted to the Court upon their records. The testimony of every witness examined, including Genl. Denver himself, shows positively, that Mr. Peck had almost exclusive charge and conduct of the Court of Claims business belonging to the firm. Mr. Peck says, (Record, p. 184,) that up to the time of his sickness, he remembers but one case in the Court of Claims in which

† perhaps it may be charitable to say, from inadvertence,

Genl. Denver prepared a brief and, elsewhere he says, (R., pp. 95 and 186,) that with but few exceptions he prepared all the briefs in the Court of Claims cases and that Judge Hughes and Genl. Denver did but little or nothing in these cases. Arthur Denver (the General's brother) testifies, (R., p. 134:) "Mr. Peck did nearly all the Court of Claims business." Genl. Denver says, (R., p. 118,) that he himself gave attention to business in the Departments and before Congress, partly because he disliked office work, and further says: "Mr. Peck gradually fell into the control of all the Court of Claims business, I presume because it suited him better." Mr. Roane (R., p. 63,) and elsewhere, states substantially the same facts. Genl. Denver's testimony, (Record, pp. 119 and 125–128,) while it may be literally true, as to his temporary connection with many of the Court of Claims cases in their final stages, yet conveys the false impression that these cases were attended to and gained by him. Mr. Peck says that Genl. Denver "argued or submitted without argument, a great many cases. I think twenty or thirty," (R., p. 110.) He could not, however, identify a single case, (R., p. 111.) Genl. Denver, (R., p. 206,) in reply to a question as to how many cases he attended to, says, "Somewhere in the neighborhood of ninety;" and just before, he says that "he had prepared all the briefs that were necessary to win all the cases that we had in the Court of Claims." The conflict of memory between these two gentlemen is somewhat noticeable and we call the special attention of the Court to this fact.

The entire number of cases in the Court of Claims in which the firm of Hughes, Denver & Peck was employed amounted to about one hundred and thirty, as their books and as the docket of the Court of Claims will show, and Genl. Denver, *according to his own testimony*, prepared, attended to, and disposed of nearly ninety of these in the five or six months of Mr. Peck's sickness and absence in Europe, while Mr. Peck himself in as many years, by assiduous labor under which his health broke down, to say

nothing of the cases attended to by Judge Hughes or of the briefs prepared by employés of the firm, (R., p. 146,) and other necessary work, could only have disposed of about thirty or forty. In view of the brilliant results accomplished by Genl. Denver, it seems a pity that he was not placed in charge of the Court of Claims business in the very beginning. It is manifest, that he mistook his vocation when, as he says, he devoted himself, in the earlier days, exclusively to the Department and Congressional business.

In the division of business between the parties, the conduct of cases in this Court naturally fell upon Judge Hughes, as the leading member of the firm. The Appellants here say in their Answers to the Bill of Complaint and in the testimony given by themselves, and not corroborated by any other witnesses, that these cases were "grossly mismanaged and shamefully neglected," and that Judge Hughes frequently knew no more of a case to be argued than "he could gather by a partial reading of the record in a street car on his way to the Capitol"—that he employed other persons to argue his cases, and that their services were paid for with money of the firm. (R., p. 14.) These are serious allegations against a dead man, their former partner, and ordinarily would be considered malicious, if not slanderous, inasmuch as not one of them was proved even by themselves, when they were called upon to give specifications and particulars. The testimony both of Mr. Peck and Genl. Denver upon this subject, to be found on pages from 107 to 109 and from 137 to 140 of the Record, are well worth careful examination and attention. It shows, that while they were willing to strike at Judge Hughes, they were possessed of no facts upon which to base their dishonoring imputations. They abandon altogether the charge that associate counsel employed by Judge Hughes were paid out of the money of the firm (R., p. 140) except in one small case—the name even not remembered (R., pp. 88 and 107) in which a fee of $500.00 was alleged to have been paid. Even if so—and the charge is too vague to

combat—the payment could not have been made without their consent, express or implied. Mr. Peck, when closely pressed in cross-examination, (R., p. 109,) could not put his finger upon a single case which was lost in this Court on account of the neglect or inefficiency of Judge Hughes—a complaint against him which both he and Genl. Denver had so strongly and offensively made in their Answers. Cases in which he appeared in this Court were lost without doubt, but there is no reason to believe and none alleged, that they could have been gained by any other person. It is decently to be presumed, that they were decided by this Court solely upon their merits. Some important cases belonging to the firm, to which he had given attention for years, were argued here by him after the dissolution and gained, as for instance, the Burns, the Silvey, the Crussell and the Ayres cases, in which fees were received amounting to over $40,000.00. In the Burns' case, alone, in December, 1871, a fee of $21,206.31 was realized. In this case, Mr. Carpenter was employed as associate counsel at the special request of the client and at his expense. (R., pp. 59 and 140.)

Whatever neglect of business can fairly be charged against Judge Hughes, and there may have been some, occurred chiefly during the last two years of his life, when according to the testimony of his physician, in the one year, he was seriously ill and threatened with paralysis, and in the other, laboring under the disease of which he finally died. We have before called attention to the extraordinary fact, that this sickness has not been recognized, or even alluded to, by the appellants in their pleadings, their testimony, or their briefs.

If it were ~~them~~ important, we might say much in the way of rejoinder and counter statement, with regard to the neglect of business by Genl. Denver, and of his incapacity and inefficiency in the firm, but we will only refer, for whatever it may be worth in a legal view, to the testimony, perhaps conflicting in some minor particulars, but

harmonious in the main, if carefully examined, to be found on pages 189, 190, 201, and 204 of the Record.

Denver & Peck compliment each other and themselves, in their answers and in their testimony, and at the same time depreciate Judge Hughes whenever they can *make* the opportunity. Denver speaks of Peck as "the equal in ability and knowledge of the law" of Judge Hughes, and his superior in industry and attention to business (R., p.11,) and Peck says, that while Judge Hughes possessed "respectable professional attainments," he was not better known than Denver and attracted no more business to the firm, nor did he attend to it more efficiently, (R., p. 30.) This mutual admiration and endorsement of each other, cannot be argued against and it must go for what it is worth. It may be accepted by persons who did not know the parties, but it will not be, by those who did. Judge Hughes may have performed less labor in the later years than either of his partners, but it might have been of a better quality.† The value of labor is but ill represented by *quantity*. The hod carrier will never be considered the equal of the architect, nor the organ grinder of the educated musician.

The Appellants lay stress upon the fact, that Judge Hughes did not occupy the firm's office, and that he but rarely visited it. This they call abandonment of the firm business. Extended reply is not needed. Soon after the dissolution of the partnership, the firm office was removed from G street to No. 1115 Pennsylvania Avenue, over Cochran's Tobacco Store, and about the same time Judge Hughes removed his quarters, including office and lodgings, to No. 1231 Pennsylvania Avenue, within half a square of the firm office. After remaining there for a time, he again removed his office to the third story of the same building occupied by the firm, (R., pp. 53 and 150.) He preferred, for reasons which are known but do not appear in the evidence, and therefore cannot be set forth here, to transact firm business in his own private office, to which all the papers relating to cases in his special

† It is to be presumed that it was.

charge were transferred, (R., p. 60.) Until the quarrel with Genl. Denver, he was in daily business and social intercourse with him in this office and at longer intervals with Mr. Peck, (Ibid.) This arrangement caused no inconvenience to himself, to the firm, or to persons having business with it. Clients were received and consultations were held with his partners in his own separate office, (Ibid.) The mere fact of his not occupying the firm office amounts to nothing. It was not necessary in any sense for him to occupy it, since he was easily accessible where he was, both before the removal and afterwards, but on account of his unfrequent visits there, a very small technical point is attempted to be made by the Appellants for their own ends. Mr. Peck occupied a back room not adjoining the others, and not more accessible than Judge Hughes' office up stairs, and nothing has been said about it. The only difference is, that Judge Hughes himself paid the rent of his own separate office in addition to paying his share of all the expenses of the firm office. Genl. Denver and his brother occupied the front room where they received the clients and visitors of the firm as well as their own private clients and numerous visitors. Genl. Denver's room, in which a table was set apart for Judge Hughes, was the official reception apartment of the firm, and it does not appear that Mr. Peck's visits there were more frequent nor longer in duration than those of Judge Hughes. It is to be presumed, that these unfrequent visits, on the part of both of them, resulted from tastes, from habits, and from personal preferences as to company and surroundings.

To show further how devoid of merit, is this pretension with regard to the alleged abandonment of the firm office—*the domicil of its business*, as it has been rather pompously styled, it is only necessary to mention the fact, that before the dissolution, the firm occupied an entire house on G street, and that Judge Hughes had exclusive possession of the third floor and Genl. Denver and Mr. Peck, together with the clerks and employees of the firm, of the first and sec-

ond. Communication between them was not more easy, if as much so, as when Judge Hughes had his private office in the Cochran building immediately over the rooms occupied by Genl. Denver. (R., pp. 53 and 153.) This subject is not worth pursuing, and more, perhaps, has already been said upon it than it deserves. In this connection, the removal of Judge Hughes' Law library from the firm office to Indiana, has been mentioned as a grievance and cited as evidence of the abandonment by him of the firm business. It is only necessary to say in reply, that Mr. Peck's library and the books belonging to Genl. Denver remained for the uses of the firm. Judge Hughes' library was removed for private reasons having no connection whatever with the firm or its business, and no complaint on this account was ever made until the commencement of this suit. It is too late to make complaint now.

We have gone over in their logical sequence rather than in the order of their presentation, the various points brought forward by Messrs. Denver and Peck in their *offensive-defense*, and we have answered them, we believe, very conclusively. The Lamar case yet remains to be discussed, and also some minor matters which we propose very briefly first to dispose of.

3. *The Perry Fuller Case.*

The most important of these is the statement with regard to the case of *Perry Fuller*. All that relates to this case, alle gations and testimony, will be found in the Record, pp. 14, 32, and 124, 129, 130. Perhaps nothing more than this reference is necessary. It will be seen that the Appellants here, most recklessly, make a charge involving Judge Hughes' reputation and honor, which they fail to prove or even to make probable. They say that he borrowed $2,000.00 from Fuller, gave his own note therefor, and afterwards refused to pay it, upon the ground that Fuller owed the firm a larger sum than the amount of the note, and that " he has thus compensated his note with a

debt due to the firm." (R., pp. 14 and 32.) The evidence shows that the case was brought to the firm, but before anything had been done in it, *at the request of Mr. Fuller*, Messrs. Chipman and Hosmer were associated in its prosecution, performed all the labor required, gained the case, and received their fee. Hughes, Denver & Peck did nothing as their* case-book will show, and earned nothing, and no fee was due to them. If a fee was due, it certainly was not on account of labor performed by any member of the firm. Mr. Peck says, (R., p. 89,) "we always claimed that they (Fuller and McDonald) ought to have paid us a fee in that case." Genl. Denver says, (R., p. 124,) "I suppose we ought to have had (a fee,) for we attended to it, and we have the books to show that there was *some work* done in the case by us. The entry on our books is for an agreed fee of ten per cent. or twenty, I am not sure which." And afterwards, on p. 140, he says: "In the case of McDonald and Fuller I stated that my impression was the fee was either ten or twenty per cent. I find upon reference to our books that there is no fees mentioned at all." And the *books* equally show the fact, which he omitted to state, that the firm rendered no services in the case. The money borrowed by Judge Hughes from Fuller was a personal

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* [Extract from Case Book.]

McDonald & Fuller for (No. 37) Commissary Vouchers.

1865.

Nov. 8. Filed power of atty. with Com. Genl. Sub.
Mr. Fuller was referred in this case to Messrs. Chipman, Hosmer & Co. by Judge H., and that firm was employed from motives of expediency, and have since that time had the management of the case, with a special contract made with them by Mr. F. as to fees, not affecting our arrangement as to the same.

1867.

June 8. Judge H. was this day informed that additional testimony had just been taken in this case, and that the same was about closed in the Court of Claims (by Mr. Chipman.)

" 17. Judge H. had an interview with Perry Fuller about this case.

transaction, for which he gave his *individual* note, and it was not paid, because he afterwards rendered services to Mr. Fuller which he estimated as of greater value than the amount of the note. Messrs. Denver and Peck assumed, without a *scintilla* of proof, that they were legal services rendered on account of the firm. If this had been true, surely an individual note would not have been given by Judge Hughes for the amount obtained. The firm was dissolved in 1869, and the services performed by Judge Hughes for the benefit of Mr. Fuller *may have been*, and it is only just to assume that they were, rendered after the dissolution. There is nothing to show that they were legal services. When Genl. Pike, the Attorney for Mrs. Fuller, (Mr. Fuller being then dead,) presented the note for payment, he was informed by Judge Hughes that Mr. Fuller owed *him individually* a considerably larger amount, and that he therefore considered the note settled and paid. (R., pp. 129 and 130.) It appears that Genl. Sanborn afterwards *told* Genl. Pike that Judge Hughes had "*incidentally*" stated to him in conversation, that Fuller owed the *firm of Hughes, Denver & Peck* a larger amount than the note, and that it was settled in that way. (Ibid.) The testimony of Genl. Sanborn was not taken, and his statement to Genl. Pike is not evidence, and deserves no notice whatever. This statement is at second hand—was not made under oath—was not sifted by cross-examination, and since it contradicts the *positive statement* made by Judge Hughes to Genl. Pike himself, who was the Agent of Mrs. Fuller, the "*incidental*" declarations of Judge Hughes to him must have been imperfectly remembered. This is but a reasonable and decent presumption. Messrs. Denver and Peck, however, with a keen sense of their interests, but, we are constrained to say, with a lax sense of the obligations of justice and propriety, assert upon mere suspicion, that the amount was due to the firm, and that Judge Hughes in effect appropriated it to his own use.

These and other imputations equally unfounded, show

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Perry Fuller was referred in this case to Messrs. Chipman, Hosmer & Co. by Judge H., and that firm was employed from motives of expediency, and have since that time had the management of the case, with a special contract made with them by Mr. F. as to fees, not affecting our arrangement as to the same.

1867.

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987.00, (R., p. 237,) on account of an alleged fee due in the McDonald & Fuller case; this is the Perry Fuller case brought forward in their answers, in which they falsely charge Judge Hughes with having compensated his individual note for $2,000.00 with a debt due to the firm. This charge we have already disposed of and we do not think that more is needed to be said. They not only claim the $2,000.00 but the entire amount of a fee, which they say ought to have been collected by Judge Hughes. No services were ever rendered in this case as we have shown and no fee was due, but even if it was, it was no more Judge Hughes' duty to have collected it, than it was that of any other member of the firm.

4. *The La Plante case*, (R., p. 237.) This was a case in which a compromise was made, after the death of Judge Hughes, with certain parties who claimed an interest in the fee. Denver & Peck say, that these parties were entitled to no part of it, but that in consequence of the admissions of Judge Hughes, they were forced to make the compromise to avoid a law-suit, and that the whole amount so paid, ($4,500.00) should be charged to his estate, his proportionate share having already been paid, (R., p. 55.) It is a new doctrine in law and in morals, that one partner can be held responsible in money to another, for making admission to his adversary in a suit, of a fact which he knew or thought to be true, although it might be damaging, (R., pp. 202 and 3.) If a partnership of lawyers was an association for the purpose of defrauding, or if lawyers are to be considered "sharpers" not gentlemen, this principle might be allowed but hardly otherwise.

5. *The Lamar Case*, (R., p. 237.) This is an important case and we defer at present any comments upon its merits, but simply call attention to the fact that Messrs. Denver & Peck claim they should be allowed in settlement with Judge Hughes' estate, if his participation in the fee is allowed at all, the difference between fifteen per cent. which they demanded from Lamar and hoped to get as

fees, and ten per cent. which was agreed to and which they actually received. This extraordinary proposition is so preposterous that we do not propose to controvert it but let it stand as they make it.

6. *The Adams Case*, (R., p. 237.) In this case, claim was made for $23,400.00, and judgment was obtained in the Court of Claims for $2,080.00, and Messrs. Denver & Peck say that they were compelled to abandon the fee, in consequence of the neglect of Judge Hughes to take appeal to this Court and file the record here, (Record, pp. 13 and 32.) In the first place, it does not appear from the evidence, that it was Judge Hughes' duty to have perfected the appeal and to have filed the record. It would have been his duty, under the tacit arrangement between the partners to have argued the case when it was reached, if the record had been filed. In the second place, they assume that the case would have been gained here, if it had been prosecuted. If not gained, the fee being contingent, would not have been due. This statement is all that is necessary to dispose of this claim. They do not say, and it is not true, that Judge Hughes ever filed a record in this Court in any case. It was not his duty to have done so. This duty *naturally* belonged to Mr. Peck, both as the junior partner, and as the manager of the Court of Claims cases and he had always attended to details of this kind.

7. *The Shelby and Bertinetti Cases*, (R., p. 237.) In these they claim, in the first, an allowance of $500.00, and in the second of $1,000.00, in consequence of the abandonment of the cases by Judge Hughes and the surrender of their papers to the claimants. The testimony of Mr. Roane, which they do not controvert, shows that the papers were given up with the consent of Messrs. Denver & Peck in the second case, and no testimony whatever was introduced with regard to the first, (see Record, pp. 203 and 205.) It is to be presumed, in the absence of proof to the contrary, that

Mrs. Shelby's papers were also surrendered with consent and upon sufficient grounds.

8. *Office Expenses*, (R., p. 237.) The claim which Messrs. Denver & Peck make for office rent, clerk hire, printing and office expenses at $150.00 per month, although exorbitant, has not been denied by the Executor but allowed, (R., p. 243.)

9. *Family Expenses*, (R., p. 237.) An allowance of $6,000. per annum *each for the support of themselves and families* is claimed until the business of the old firm is finally closed up. This is the most extraordinary claim which has been made in this case, and is the fitting climax to them all. The *office expenses* were allowed by the Auditor and the amount deducted in the decrees of the Court below, (Record, pp. 243 and 246.) They demand, besides $12,000.00 a year or $1,000.00 a month for their *private and family expenses*, exclusive of *office expenses* already allowed, until the final settlement of this suit. Is it to be wondered at, if we consider their claim as being made in good faith, which it is scarcely possible to believe, that they have resorted to cunning devices to postpone the day of settlement? By their method, it is only necessary to delay, in order to pay their debt to the estate of their deceased partner, and besides to absorb in themselves all that he might possess from other sources. The claim is the more extraordinary, inasmuch as the amount embraced in the decree, with the exception of $3,138.29, (R., p. 243,) is on account of fees earned by the firm, in the life-time of Judge Hughes, in cases, in which no labor since his death has been performed by Messrs. Denver & Peck, except mere routine labor—and this, not chiefly rendered by them, nor at their expense, in procuring the withdrawal or dismissal of appeals. These things the Appellants here, have sedulously attempted to conceal or obscure by bold assertions and reckless assumptions, but a careful examination of the Auditor's Report, together with the testimony and Exhibits,

(Record, pp. 209 to 244,) will show that we have understated rather than exaggerated the facts. The "arduous labors," of which they so feelingly speak in their Answers, (R., pp. 20 and 38,) for the emolument and profit of Judge Hughes and his estate, will be found to be but "figments of the imagination."

V. The Lamar Case.

What we have said heretofore, applies to the entire suit, but there are certain facts and principles connected with the Lamar branch of the case which deserve special notice and attention. The testimony was taken separately, and will all be found together in the Record on pages from 149 to 181. The rhetoric in this case, together with the indignation of Messrs. Denver and Peck against Judge Hughes and his representatives for claiming a share of the enormous fee collected, ($66,911.24,) will be found in their Answers to the Bill of Complaint, the Brief of their Counsel, and perhaps the oral arguments to be made here. The facts, which we now propose to illustrate with some comment, will be found in the Record.

These facts are as follows: In the year 1868 Mr. Gazaway B. Lamar, a citizen of Georgia, who had been a rebel but had taken the amnesty oath, filed in the Court of Claims, through the firm of Hughes, Denver & Peck, a petition for the recovery of a large amount of cotton captured by the U. S. Army in Savannah after Genl. Sherman's entry into that city. The case fell into Mr. Peck's hands for management, and it was managed by him most skilfully and successfully. Mr. Lamar, under the law as it had been interpreted up to that time, had no standing in the Court of Claims, and repeated motions were made by the Solicitor of the United States to strike the case from the docket, but these motions were thwarted by dilatory proceedings, extending over several years, resorted to by Mr. Peck, until this Court decided in The United States *vs.* Klein (13 Wallace, p. 128) that the Amnesty Proclama-

tion of President Lincoln restored, to those who had taken the benefit of it, the rights which had been forfeited by rebellion. Mr. Lamar was one of these persons, and he was thus rehabilitated in all his rights. (Rec., pp. 153 and 168–170.) Voluminous testimony was taken amounting to upwards of 500 printed pages, and in June, 1873, five years after the filing of the petition, judgment was obtained in the Court of Claims and appeal taken to this Court, which was dismissed by the Attorney General without argument in April, 1874, and the large fee previously mentioned collected by Messrs. Denver and Peck. (R., pp. 165, 171, and 173.) The service in obtaining the dismissal was rendered by Gen. Butler and paid for by Lamar, as Mr. Peck himself testifies. (R., pp. 229 and 232.)

They deny in their Answers (R., pp. 16, 17, 34, 35, and 36,) that Judge Hughes ever had any interest in this case, inasmuch, as they allege, he withdrew from it and denounced Lamar as a scoundrel, and his case as fraudulent, not only to indifferent persons, but to Charles F. Peck and Judge E. Peck, one of the judges who was to hear and adjudicate upon it, and that he stated to the said Judge Peck that he would not touch a dollar of the fee—that he tried to pursuade Charles F. Peck, his partner, to withdraw from the case, which he refused to do, and that Judge Hughes then said that he would settle his own claim for past services individually with Lamar. Denver and Peck also say that they afterwards made a separate contract with Lamar at ten per cent. for their services, and that no definite contract on the part of the firm had previously been made, and that Judge Hughes never set up to them during his lifetime claim for any part of his fee.

It will be observed that the two principal points the Appellants make, why Judge Hughes should not be permitted to participate in the large fee they collected, are: first, on account of his withdrawal, and second, his alleged denunciation of Lamar and his case. These points we will first

notice, and afterwards the others, which perhaps are not so important.

1. *The Withdrawal of Judge Hughes.* As previously stated and as appears in the Evidence, *passim*, Mr. Peck had charge of the Court of Claims cases belonging to the firm, and had special and almost exclusive charge of this case from the beginning to the end. Neither of the other partners rendered in it services of much importance. Nor was it their duty to do so. It so happened, however, that Judge Hughes, during the absence and sickness of Mr. Peck, and while he himself was sick, had charge of the case for a short period, (R., pp. 156 and 171,) during which, he held frequent consultations with Mr. Lamar and performed some services, which, however, fell short of Mr. Lamar's exactions. Judge Hughes resided in the country and on account of the varying condition of his health was not able to attend at his office every day. This probably gave rise to Lamar's complaint, as stated by Denver & Peck, that Judge Hughes neglected his business, and avoided seeing him. Mr. Peck himself says, (R., p. 168,) and it is true, that "Mr. Lamar was an extremely indiscreet, passionate and resentful man." Judge Hughes was also indiscreet and on account of his sickness was then unusually irritable. A quarrel between the parties ensued, and under the influence of passion he made a formal withdrawal of his appearance in the case. The original motion of withdrawal was prepared by Mr. Peck at Judge Hughes' *request*, not *from his dictation*, as stated in the Answer to the Bill, (R., p. 17,) and reads as follows: "U.S. Court of Claims. G. B. Lamar *vs.* The United States. No. 3222. Now comes James Hughes, heretofore one of the attorneys of record in this case, and moves that his name be erased as such attorney, and that he have leave to withdraw his appearance and sever his connection with the said cause." Judge Hughes struck out the words: "that his name be erased as such attorney" and "and sever his connection with said cause," and added

in his own handwriting, the words,—"reserving to the firm of Hughes, Denver & Peck, and every member thereof, all rights as to full compensation for services rendered up to the present time," (see Record, p. 165, and also p. 154, where a full explanation of the alterations made, will be found.) Upon reflection, however, it occurred to Judge Hughes that it would be best to put his withdrawal in a more simple form, which he did as follows: "U. S. Court of Claims; G. B. Lamar vs. The United States. No. 3,222. Now comes James Hughes, one of the attorneys of record in this case, and asks leave to withdraw his appearance herein." (R., p. 165.) This notice was filed and allowed on the 9th day of January, 1873, (Record, p. 164,) but the original motion as prepared by Mr. Peck, as above explained and modified by Judge Hughes by erasures and additions, was preserved and filed away for record. (R., p. 155.) It is not pretended that it has any legal force, further than to show that it was not Judge Hughes' intention, when he withdrew from this case, to relinquish his right to his share of the compensation for services which had been rendered by the firm. This intention of Judge Hughes to retain his interest, is further rendered manifest by the extract from the diary of the firm of James Hughes & Co., to be found on page 157 of the Record. This diary was kept by Mr. Roane, at that time Judge Hughes' partner in business, and the entry was made by Judge Hughes' direction. It reads as follows: "June 6th, 1873. Examined judgment docket in the Court of Claims, and found the following had been given June 2d: G. B. Lamar for $579,343.50. In this case Denver & Peck are counsel of record, Judge Hughes having withdrawn his appearance, but without relinquishing his right to his portion of the fee to be paid by Lamar."

This case had been with the firm since the spring of 1868, then nearly five years, (R., p. 170,) and at the time of the withdrawal was "nearly finished." Nothing of much importance was done afterwards, as an examination

of the copy of the docket entries of the Court of Claims, to be found in Record, p. 164–5, will show. According to these entries, the motion of withdrawal was made and allowed January 19th, 1873, and judgment rendered June 2nd of the same year, less than five months afterwards.

The great and most important service which had been rendered in this case—that of keeping it upon the docket, in face of the vigilant opposition of the Government Solicitor—had already been performed by Mr. Peck, acting for the firm, the testimony, comprising 500 printed pages, had already been taken, and this Court had already decided in the Klein case, all the principles which ruled the case of Lamar. Nothing remained to be done with regard to evidence, except to call upon the Treasury Department for certain information, which was soon after furnished. A brief was filed and an oral argument was made, which only involved the labor of presenting the facts intelligibly to the Court. (Record, pp. 165 and 173.) Mr. Peck performed all this labor from beginning to end, with the exception of some trifling assistance from Judge Hughes and Genl. Denver. The services of the latter, as he himself states, consisted in taking depositions which occupied parts of two days. (Record, p. 175.)

The withdrawal of Judge Hughes, therefore, did not injure the case, inasmuch as he *did not have* the control or management of it, and *never had* except for a very brief period, as previously stated. Mr. Lamar was not deprived of any services, which would have been rendered, if there had been no withdrawal, nor was any additional labor by this act, imposed upon either Peck or Denver. How were they injured or in what way was injury inflicted upon the case? Mr. Peck simply performed the duties he would have performed, (Genl. Denver did nothing, after as before,) and Mr. Lamar received the same services as if there had been no withdrawal. But Judge Hughes' partners seeing their opportunity in the mere fact of his withdrawal, took quick advantage of it, to his injury and to their own pecuniary

benefit. The withdrawal of appearance was not intended by Judge Hughes to be a renunciation of his share of the fee for services which had been rendered by the firm, as the original motion and entry in the Diary show, but it was merely an indiscreet exhibition of irritated feeling by a sick man in an unguarded moment, to satisfy a point of personal and professional pride, and a renunciation of his individual responsibility for the *argument* and *future conduct in Court* of a case which was then, had always been and remained to the last, in the hands of Mr. Peck, with Lamar's knowledge and implied approbation. The withdrawal and renunciation, therefore, were merely matters of form, not of substance.

2. *The alleged denunciation of Lamar and his case.*

The proof of this denunciation rests upon the testimony of two witnesses—one, that of Charles F. Peck, Appellant in this suit, and the other, that of Ebenezer Peck, one of the judges of the Court of Claims. Both are highly respectable but interested witnesses—the first pecuniarily to a large amount, not less than $11,000.00, and the other from natural affection for his son and regard for his welfare. Their statements, while probably true in the main, under the circumstances, are to be received with many reservations. They were both interested to exaggerate and place false constructions upon Judge Hughes' expressions, and it will not do to assume, because men are gentlemen, that their declarations may not be greatly influenced and colored by self-interest.

The Answers to the Bill of Complaint allege that Judge Hughes denounced Lamar as a scoundrel and his case as fraudulent, not only to Charles F. Peck, his partner, and to Judge E. Peck, but also to other persons, and that by this denunciation he endeavored to defeat the case. (R., pp. 17 and 35.) The testimony of Charles F. Peck as to Judge Hughes' conversations with him with regard to Lamar is illegal under the statute, and ought to be rejected;

but if accepted, surely the conversations of partners upon matters of their common business, like those between husband and wife, should be regarded as sacred, and tney cannot be taken advantage of by one of the parties in courts of law. The testimony of Judge Peck must be accepted, but it is not unfair to say that it was probably influenced somewhat by the bias of affection. The statement is made by the Appellants in their Answers—we do not aver with a motive to deceive—that Judge Peck was one of the judges who was to try the case and adjudicate upon its merits. (R., p. 35.) This is not true; Judge Peck had been for some time relieved, on account of ill-health, from the duty of hearing causes, and was assigned to that, merely, of hearing motions in Chambers, and besides, he himself testifies, that he made it a rule not to take part in cases in which his son Charles F. Peck was employed as an attorney. (R., p. 179.) Judge Peck says (Ibid.) that when Judge Hughes filed his motion of withdrawal, he denounced Lamar as a "great rascal," and, according to his recollection, he said at the same time that "he declined to have any interest in the case or to take fees, because he believed the case was a corrupt one and not likely to succeed, and that he would not lose much by his withdrawal from the case." Judge Peck further says, (R., p. 180,) that he and Judge Hughes were on the bench together, and "consequently that he spoke more freely to him than he would have done about matters." These declarations and proceedings took place *privately* in Chambers, and not in the court-room in presence of other parties. It further appears from the testimony of Judge Peck, that the denunciation of Lamar was made in a *conversation* after the motion of withdrawal had been allowed, for he says that he could not "recollect whether or not he reported the *conversation* of the decedent Hughes to the other judges;" (R., p. 179,) and further, that, while an unfavorable impression was made upon his mind by the allegations of Judge Hughes both as to the claim and the claimant, the

impression was not so deep as to make him "retain it." (R., Ibid.) It is evident, from these statements, which we have not distorted nor misrepresented, that the denunciation of Lamar by Judge Hughes made but a temporary impression upon the mind of Judge Peck, and although he says that he probably "repeated the conversation to the other judges," with due deference to him, we think the probability is entirely the other way. For, if the denunciation had been repeated to the other judges, an investigation as to the character of the claim could not have been avoided, after a formal charge of fraud had been made against it by a man of high professional reputation, who had been one of the judges of that very Court, and who was then one of the attorneys of record in the case. There was no such investigation, and Judge Peck, knowing well Judge Hughes' temper and the condition of his health at that time, appreciated the denunciation at its proper value, as a mere expression of irritated feeling, and took no notice of it. *Otherwise*, he failed in a very grave matter of public duty, which we do not charge nor believe. Nothing, probably, would have been heard of the denunciation, if it had not been perceived that pecuniary advantage could be taken of it. The case was gained very shortly afterwards, as indeed it had been practically gained long before Judge Hughes' withdrawal, at the time when this Court rendered its decision in the Klein case. It would be a hard rule to hold any man, and much more a sick man, to a rigid responsibility for a mere hasty expression of anger, and on that account to divest him of valuable rights of property. The law is more merciful than that. There was no denunciation of Lamar, as the record will show, except to these two witnesses.

Genl. Denver, having *done nothing in the conduct of the case*, is apparently anxious to figure in this branch of it, but he states nothing of his own knowledge, and in his Answer to the Bill of Complaint merely repeats at second hand the tale told to him by Mr. Peck. (R., p. 17.) They

both also say in their Answers that Judge Hughes denounced Lamar to other persons, (R., pp. 17 and 35,) and attempted to defeat the case and prevent them from realizing anything out of it. These are reckless assertions, and they are not sustained even by their own interested testimony. With regard to defeating the case, Mr. Roane (R. p. 164) testifies, (and there is no other testimony upon this point) that Judge Hughes said to him that "he did not intend to injure the case in any way because he considered himself interested in it, and even if he were not interested in it he would not do so." The allegation of Judge Hughes' denunciation of Lamar as a "scoundrel" comes with ill-grace from Mr. Peck, since it appears in the evidence that he, too, denounced him to Mr. Roane as a "rascal," and said that "he had no confidence in his case." (Mr. Roane's Test., R., p. 157.) Mr. Peck denies this, (R., p. 168,) and attempts to explain the reason of "his want of confidence," and says that he only called Lamar an "old cuss." It is not necessary to dispute about terms, and we will not waste words in drawing nice distinctions. We are, therefore, willing to let Mr. Peck have the benefit of the difference, whatever it may be, between the words "rascal" and "old cuss." The denunciations of Lamar by Judge Hughes and by Mr. Peck, in both instances, was in *conversation* between friends, and was of as much importance in the one as in the other.

3. *As to individual settlement with Lamar by Judge Hughes.*

To strengthen their case still further, Mr. Peck alleges, and Genl. Denver *swiftly* repeats, as before, not from his own knowledge, but from information and belief, that Judge Hughes expressed his determination, when Mr. Peck "declined to unite with him in withdrawing from the case," "to settle his own claim for past services with Lamar individually," leaving to Denver and Peck "to pursue such course as they might see fit." (R., pp. 17 and 36.)

The proof of this, like that of many other allegations in the case, rests *wholly upon the interested and illegal statement* by Mr. Peck of a conversation between Judge Hughes and himself, (R., p. 166.) The imputed declarations of a dead man against his own interest, and these declarations, testified to *only* by a witness himself interested to misrepresent, will not be received by Courts of Justice, except with great caution, if, indeed, they are not absolutely rejected. The statement of Mr. Peck may be true, but it is not probable. If it be true, the language used by Judge Hughes was loose and unmeaning, for he undoubtedly knew that he could not, as a member of a firm, make an *individual settlement* with a client in a case not finished, in which the fee was contingent upon success. Whatever declaration Judge Hughes may have made, it is certain that he never had such a settlement, because the judgment was not and could not have been paid until after the dismissal of the appeal in April, 1874, (R., p. 165,) some months after his death. The word "settlement" in matters of account means "adjustment and payment."

4. *Denver and Peck's contract with Lamar.*

It is stated by Messrs. Denver and Peck, that after the withdrawal of Judge Hughes they contracted with Lamar for the payment of a fee of ten per cent. for their individual services, and that Hughes was not entitled to any part of it, nor could he decently and honorably "claim it," (R., pp. 17 and 35,) and they use much other vituperative language in this connection which we do not repeat. Their indignation against Judge Hughes is cheap, and it will be estimated by this Court at its real value.

The facts are, and they appear in the record, that Lamar refused to give a written contract, or even a power of attorney, to the firm of Hughes, Denver & Peck, but he said repeatedly in conversation that he would pay ten per cent. for their services. He told Judge Hughes that he expected to pay this amount, (R., p. 156.) This fact is

also confirmed by Mr. Peck, for he says: (R., p. 167,) "We had never been able to get Lamar to agree to our terms. We wanted twenty per cent., and we hoped to be able to compromise with him at fifteen per cent. if we could not do anybetter. *He had indirectly expressed a willingness to pay ten per cent.*, which was not satisfactory to the firm, and we had never made any arrangement with him on that basis." Mr. Peck's testimony, although very *carefully guarded* so as not to make indiscreet admissions, proves that Lamar always regarded ten per cent. as the fee to be paid to the firm, and he would not and did not pay more to Denver and Peck. It is preposterous to suppose that a large case like Lamar's would be undertaken and prosecuted for years, almost to completion, without some understanding as to the fee, although there might be no written contract. After Judge Hughes' withdrawal, Denver and Peck obtained the written contract in their own names at ten per cent. This ten per cent. included all the services which had been rendered by the firm of Hughes, Denver & Peck in Lamar's case, and also the separate services which were thereafter to be rendered by Messrs. Denver and Peck; otherwise, the firm received nothing for services which extended over a period of five years, and which embraced the most prominent, rendered in the case, viz: that of keeping it upon the docket, in face of repeated motions by the Government Solicitor to dismiss, until the decision of the *law* in the Klein case, and until the testimony, amounting to 500 printed pages, proving *the facts*, had been taken. The services rendered by Messrs. Denver and Peck, or rather by Peck alone, (since Denver did *absosolutely* nothing) extended over a period of *five months*, and consisted in arguing the case after the *facts* had been proved and the *law* decided, and this it would have been his duty to have done, if Judge Hughes had not withdrawn. They claim that the enormous fees of $66,911.24 was paid for their comparatively trifling individual services of a few months' duration, and that nothing was due

for the services of the firm for a period of five years, during which all the important work was done. As Lamar paid what he always said he would pay, and nothing more, it made not the slightest difference to him whether the amount was paid to the firm of Hughes, Denver & Peck, or to Denver and Peck alone. The payment was for *all* the services which had been rendered to him in the conduct of his case from the time when the petition was filed until the judgment was paid. It matters not that the written contract was finally made in the names of Denver and Peck, since it covered all the services rendered in the case. They could not by their act divest Judge Hughes of his right to his proportionate share of the fee for services which had been rendered by the firm, and these the most important in the case both in magnitude and duration. There is not one word of testimony nor even an allegation that this private contract, affecting so seriously Judge Hughes' interests, was ever communicated to him or that he had any knowledge of it. If it had been communicated, can there be a doubt, in the light of his preservation of the original motion of withdrawal as amended by erasures and alterations and of the entry in the Diary, that he would have protested against it? He cannot, then, under any recognized principle of law, be deprived of the benefit of this contract.

Denver & Peck complain and make much of it, that Judge Hughes never set up to them, during his lifetime, claim for any part of the fee in this case, and that he never communicated to them that he had preserved the original motion above referred to, reserving his rights, and that he had caused the entry to be made in the Diary of the firm of James Hughes & Co., (R., pp. 16, 34, 35.) It is difficult to see, what necessity for such a communication existed, or why a duty was incumbent upon him to make it. When we remember, that he was not on speaking terms with Genl. Denver at that time, and that he but rarely saw Mr. Peck, (R., pp. 18 and 86,) it cannot be considered very ex-

traordinary, that he made no communication to either of them that he intended at the proper time to claim a part of the fee in the case, if it ever should be collected, and that he had preserved a record of his rights. There was no concealment, but there was no necessity of formal communication with regard to a matter, which he had no reason to believe would be disputed. He did not doubt his right to participation in the fee, and therefore he said nothing about it. If he had said anything, a doubt might have been inferred. Claim was made by Judge Hughes' Executor, immediately after the fee was collected, and there was no proper time previously, when it could have been made.

5. *The Martin Case, and Mr. Peck's Admissions in Connection Therewith.*

This is the *most important* branch of the Lamar case, for reasons which will be seen, and it is the last we will discuss. All the testimony in the record with regard to it, will be found on pages 158 and 159 and 169 and 170. To this and to Denver & Peck's allegations in their Answers to the Bill of Complaint, (R., pp. 17 and 35,) we respectfully call the attention of this Court.

It appears that Martin, through his wife, owned about 259 bales of cotton, which were stored with Lamar and seized with his own cotton, at the time of the capture of Savannah. Lamar, as a factor, had made advances upon the cotton, and therefore included it in his own claim. A separate suit had been instituted by the Administrator of Mrs. Martin's father, but no recovery could be had, because ownership by him could not be proved, and Martin the real owner, had failed to bring suit within the time prescribed by the statute. The case then became part and parcel of the Lamar case and was included in it. When the judgment was collected, Lamar, of course, retained the amount of his advances, and paid over the balance ~~to him~~. At the time when Martin brought his case to the firm of Hughes, Denver & Peck, he was advised by them, (since on account of limitation of law, he could not obtain a separate recovery), to allow it to remain incorporated, as it then was,

with that of Lamar and be prosecuted with it, and Judge Hughes, acting for the firm, made a contract with him for fifty per cent. of the amount which might be recovered in his behalf. After the money had been paid over to him by Lamar, Martin remonstrated against the fee as excessive, on account of the large amount—nearly one-half—which had already been deducted. In this condition of things, Mr. Peck, with the approbation of Gen. Denver, (he says—"Gen. Denver told me to do just what I pleased,"—R., p. 170,) came to Mr. Roane, Judge Hughes' Executor, stated the facts and asked his consent to a reduction of the fee to be demanded from Martin, which was readily given, and he (Mr. Roane) suggested thirty-three and one-third per cent as a proper amount to be charged, but left the matter to Mr. Peck's discretion. A compromise was made at thirty per cent. and the amount paid over by Martin to Messrs. Denver & Peck, no part of which has ever been paid to Judge Hughes' estate or acknowledged as due to it; but, on the contrary, the obligation has been repudiated in every shape and form. The fee was a large one, amounting to upwards of $13,000.00, and it constitutes a part of this $66,911.24 paid in the Lamar case, (R., p. 219.) This statement is unexaggerated and all the facts appear in detail in the testimony. Mr. Peck states, (R., p. 170,) that he was unwilling to make the compromise with Martin without getting Mr. Roane's assent and "merely as a *precautionary measure to avoid putting myself*" (himself) "*in a position of being liable,* I called upon Mr. Roane and asked him if he would object and he acquiesced. He said he would acquiesce in whatever I did. He thought that perhaps 30 per cent. was rather too low, but he said whatever I did he would not complain of. He suggested 33⅓ per cent. I settled at 30 per cent. I did not understand that Mr. Roane objected to any settlement I should make. Nothing was said in the interview admitting any right whatever in any way." These are golden words, and mean more than meets the eye at first glance. It is obvious, that Mr.

Peck would not have come to Judge Hughes' Executor for gratuitous advice, and it is also obvious that he thought the Executor's consent to a reduction of the fee was necessary.

The Martin case, as we have said, was a part of the Lamar case, was embraced within it, and cannot be separated from it. All the proceedings and declarations of Denver and Peck ~~were~~ based upon the fact, that the two cases are are one and indivisable, as they are. Mr. Peck in words says (R., p. 229) that they "were really one case," and representing himself and Genl. Denver, he cannot escape, by subtle reservations, his responsibility by his act, if not by his words, of the acknowledgment of Judge Hughes' interest. He says that "in the interview" he admitted no right whatever. The *uninvited* interview with Judge Hughes' Executor was itself a most important admission both of the right and of the interest of Judge Hughes, and Denver and Peck themselves thus practically acknowledged it, in spite of their indignant declarations to the contrary.

If the Lamar and the Martin cases are separate and distinct, they are in no single instance so treated by Messrs. Denver and Peck, whether in their answers, their testimony, their briefs, or in their oral arguments in the Court below, and they apply the same objections to Judge Hughes receiving a part of the fee in the one as in the other. They are, then, by their own acts absolutely bound to regard the two cases as one, as they are in reality one in law, the Martin case having no separate judicial existence, nor was such separate existence, *actual* or judicial, recognized in any of the proceedings of the Court which gave judgment. If Judge Hughes forfeited his interest, as they assert, by withdrawal of appearance and denunciation of the case as fraudulent, the withdrawal and denunciation necessarily applies as much to one branch of the case as the other. He *could not* withdraw from the Lamar case without *at the same time*

did not denounce the Lamar case as fraudulent to his partner or his partner's father, and except that portion of it in which Martin was interested. Mr. Peck then, when in behalf of himself and Denver, he asked the assent of Judge Hughes' Executor to a reduction of the fee in the Martin case, by that act acknowledged Judge Hughes' interest in the *whole case* since the one was embraced within and was inseparable from the other, and had no existence apart from it. Although the right to this interest was not admitted in words it was admitted by *the act*, and acts convey more meaning than words, and sometimes even convey meaning which words deny. Mr. Peck does not say that he denied any right to the Executor, or reserved any right to himself and Genl. Denver, but only that "nothing was said in the interview admitting any right." There was no right in dispute, and there was no necessity nor occasion even either for admission or denial. The "precautionary measure" adopted by Mr. Peck "to avoid putting himself in a position of being liable" (R., p. 170) under Divine Providence, as we believe, was the very act of all others which fixed his and Genl. Denver's legal liability. And so it not unfrequently happens in the moral government of the world. Mr. Peck "builded better than he knew" when he took his "precautionary" steps.

We have discussed this Lamar case at length, not only because it involved so large a part of the judgment, but on account of the imputations most unjustly made in connection with it, affecting the honor and integrity of Judge Hughes. These, we think, we have proved to be groundless, and we dismiss them without further comment. When great moral indignation is expressed, it should not be tainted with the suspicion of pecuniary motives.

The only point in this case, which has even the semblance of weakness, consists in this—that Judge Hughes withdrew his appearance. This was a foolish act, we admit, but as we have said before and shown, that immediately following the quarrel it was no more than the exhi-

+ they are by their proceedings & declarations estopped from denying it

+ but without the protest, complaint, or even opposition of Lamar. (R. p. 169)

bition of a sick man's resentment of imputations upon his professional character, which inflicted no injury upon the case, no additional expenses upon Lamar, and no additional service upon Denver and Peck, *even the smallest*, that it would not have been Mr. Peck's duty to perform for the firm, if there had been no withdrawal.

VI. The Law of the Case.

It now only remains to set forth very briefly the law applicable to the case, so far as it has not already been done incidentally. In truth, this case is one in which there are no important disputed principles of law involved. The law of partnership has been well defined both in the text-books and in numerous decisions of the Courts. We will make but a few quotations and references. In Story on Partnership will be found the following, Sec. 182:

"As there is an implied obligation in every partner to exercise due diligence and skill, and to devote his services and labors for the promotion of the common benefit of the concern, it hence follows that he must do it without any reward or compensation, unless indeed it be expressly stipulated for between the partners, as it well may be under peculiar circumstances. The reason is, that each partner, in taking care of the joint property, is in fact taking care of his own interest, and is performing his own duties and obligations implied in and constituting a part of the consideration for the others to engage in the partnership; *and the law never undertakes to measure and settle between the partners the relative value of their various and unequal services bestowed in the joint business, for the obvious reason that it is imposible to see how far in the original estimate of the parties, when the connection was formed, the relative experience, skill, ability, or even the known character and reputation of each, entered as ingredients into the adjustment of the terms thereof.*"

In Section 331, he says:

"So fixed indeed is this duty still to continue to act for the benefit of the partnership, that no partner is allowed to claim any particular reward or compensation for his trouble or services, in thus assisting in the arrangement

and winding up of the concerns thereof, unless it be specially stipulated."

In Franklin vs. Robinson, 1 John. Ch., 157, the Court says:

"The parties to the contract were joint owners of the ship and cargo, and the defendant, W. S. Robinson, in his character of part owner, was not entitled to charge for his services, except upon the ground of special agreement. I know of no case which entitles one partner to such an allowance against another without an agreement. The case of Thornton v. Proctor (1 Anst., 94,) evidently proceeds upon this principle. Each joint owner, in taking care of the joint property, is taking care of his own interest, and the law never undertakes to measure and settle between partners their various and unequal services bestowed in the joint business. This must be left to be regulated by contract."

In Coldwell v. Leiber's, 7 Paige, 483, syllabus, we read the following:

"Partners are not entitled to charge each other, or the firm of which they are members, for their services in the care and management of the business of the copartnership, unless there is a special agreement to that effect, or where such an agreement can be implied from the course of business between the partners. In the management of the copartnership business, each partner is attending to his own interest therein, as well as the interest of his copartner; and the law implies no agreement to compensate either of them for their various and unequal duties and services in the management of the business of the firm."

We refer also to the following cases:

Lee vs. Lashbrooke and Lashbrooke vs. Lee, 8 Dana, 214; Burden vs. Burden, 1 Ve. & B., 168; Whittle vs. McFarlane, 1 Knapp, 341; Lewis vs. Moffit, 11 Ill., 392; King vs. Hamilton, 16 Ill., 190; Coursen vs. Hamlin, 2 Duer, 513; Justin Lyman vs. Ellis Lyman *et al.*, 2 Paine C. C., 11.

In Beatty vs. Wray, 19 Penn. St. R., 516, decided by Judge Gibson, it is held:

"That where partners are equal, and there is no stipulation in partnership agreement for compensation to surviving partner for settling up partnership business, he is entitled to no compensation. Brown *vs.* McFarlane's Ex., 41 Penn. St., 129, Syllabus: 'A surviving partner is not entitled to compensation for winding up the partnership business, nor can the executor of a deceased partner employ the survivor for that purpose, at the expense of the decedent's estate, unless he is expressly authorized to do so by the will of his testator.'

These cases refer chiefly to commercial partnerships; but the following refer to professional partnerships, in which the law applicable to the one has been decided to be equally applicable to the other: Robinson vs. Anderson, 20 Beav., p. 102. In Webster vs. Bray, 7 Ware, R., p. 159, there was a partnership between two solicitors as to the business of a particular railway company. The solicitors resided in different places. The partnership continued less than a year. The labor performed by the plaintiff was about one-twentieth only of that performed by the defendant, the latter having earned £9,000 and the former only £450. An equal share was allowed to each after certain deductions from that of the plaintiff, which had been provided for between the parties by special agreement.

This case is right to the point. Under the law of partnership, thus decided and defined, Judge Hughes' estate is clearly entitled to one-third of *all* the fees earned and collected by the firm of which he was a member, whether, in the last years of his life, he performed labor or not. Whatever may have been his short-comings in this respect, we have shown were mainly owing to his physical infirmities during this period. If Denver & Peck repudiate the contract of August 13–18th, 1869, previously set forth and commented upon, then Judge Hughes' estate is entitled to a larger amount under the law of partnership. There is no escape from this position, and we cannot perceive why they should have attempted to throw discredit upon the contract. Under the law of partnership his one-

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third interest attached to *every case* belonging to the firm of Hughes, Denver & Peck at the time of his death, in whatever stage of preparation it might be, and that too without the performance of any labor whatever upon his part.

We have treated this case at great length and therefore owe an apology to the Court, but there were so many facts and principles involved, that we have found it impossible, in justice to the subject, to have said less.

In consideration of the law and the facts, as we understand them, and have attempted to set forth, we respectfully ask this Court, not only to affirm the decree of the Court below, but also, under its 23d rule, to award to the appellee damages for the long delay in the settlement of Judge Hughes' estate caused by a frivolous appeal.

ARCHIBALD ROANE,
Executor.

S. S. Hall &
of Counsel